SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 329.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL, CHARLES BREHM, THOMAS MURACH, RAYMOND KNUTSON, JACK WERY, JOE DERSINZSKI, HOWARD LYNCH, HERMAN WEBER, PAUL BREHM, PAUL KRAFT, STEVE MALICK, WILLIAM BUCHE, GEORGE SLOAN, EDWIN BECKER and OTHMAR MISCHO,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Wisconsin.

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To the Supreme Court of the State of Wisconsin.

To the Honorable, the Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray that a Writ of Certiorari issue to review the decision of the Supreme Court of Wisconsin entered in the above entitled case on May 2, 1950, motion for rehearing denied June 30, 1950.

OPINIONS BELOW.

The opinion of the Circuit Court for Milwaukee County (R. 101-118) is unreported. The opinion of the Wisconsin Supreme Court (R. 163-171) is reported in 257 Wis. 43, 42 N. W. (2) 471.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C.

In this case the validity of certain statutes of the State of Wisconsin, to-wit: Sections 111.50-111.65, particularly Section 111.62 thereof, and a judgment based on such statutes, is drawn in question upon the ground that such statutes and judgment, on their face, and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to:

(a) Article I, Section 8, and Article VI of the United States Constitution, in that they are contrary to and in violation of rights conferred and duties imposed by superior federal legislation, to-wit: the Labor Management Relations Act, 61 Stats. 136; 29 U. S. C., Sections 141-197;

(b) Section 1 of the Thirteenth Amendment to the Constitution of the United States in that they impose involuntary servitude; and

(c) Section 1 of the Fourteenth Amendment to the United States Constitution, in that they deprive petitioners of liberty and property without due process of law, and deprive petitioners of the equal protection of the laws.

The decision of the Wisconsin Supreme Court, the last resort of all causes in the State of Wisconsin, was in favor of the validity of the statutes and judgment.

Petitioners argued before the Circuit Court of Milwaukee County (see answer, Paragraph XII, R. 145), and before the Supreme Court of the State of Wisconsin (see decision, R. 168, 169, 171), that Sections 111.50-111.65 of the Wisconsin Statutes, and more particularly Section 111.62, as construed, were unconstitutional and void and of no effect whatsoever because they were repugnant to the provisions of the United States Constitution referred to immediately hereinabove. The federal question of whether the Wisconsin statutes in question, and the judgment purportedly based on such statutes, violated the Constitution of the United States was raised therefore before every tribunal before which argument was heard.

The Supreme Court of the State of Wisconsin specifically held that neither the statutes nor the judgment based on such statutes, as construed, deprive the petitioners of any rights guaranteed under the Constitution of the United States. The Court stated:

> "The second contention, that the law is repugnant to the National Labor Relations Act and is therefore unconstitutional, has been answered in the case of **International Union, Local 232, et al., v. Wisconsin Employment Relations Board et al.**, 336 U. S. 245" (R. 168).

Answering the contention that the statutes and judgment violated rights under the Fourteenth Amendment, the Court stated:

> "The prohibitions of the statute under review are against the actions of more than one individual when acting in concert. We cannot see that any individual rights are infringed upon. If there is such infringement, it must be recognized that it is in recognition of the paramount rights of the public. The United States Supreme Court recognized this in the case of

International Union, Local 232, et al., v. Wisconsin Employment Relations Board et al., supra, page 259, when it stated: * * *" (R. 170).

In answering the contention that the statutes and judgment were in violation of the Thirteenth Amendment the Court stated:

> "Instead of being subject to involuntary servitude the employees of public utilities enjoy certain advantages, such as continuity of employment, that were mentioned above" (R. 171).

Thus the Wisconsin Supreme Court has held that the taking of a strike vote, the announcement of intention to strike, and the strike itself are in violation of the Wisconsin Statutes, subject to restraint by the Wisconsin Courts, and that such restraint is not in violation of any provision of the Constitution of the United States.

A copy of the entire record in this case as certified to be true and correct by the Clerk of the Wisconsin Supreme Court is hereby furnished and made a part of this application in compliance with Rule 38, Paragraph 1, of the Rules of this Court.

QUESTION PRESENTED.

Whether a state may, by statute and injunction, prohibit strikes by employees of "public utility" employers when such strikes will result in an interruption of "essential service."

STATE AND FEDERAL STATUTES INVOLVED.

The pertinent state statutory provisions have been printed in the Appendix to the Petition for Writ of Certiorari in the case of **Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, et al., Petitioners, v. Wisconsin Employment Relations Board et al., Respondents,** Case No. ....., a companion case to this one.

Particularly pertinent herein are Sections 111.62 and 111.63 which read as follows:

"111.62. Strikes, Work Stoppages, Slowdowns, Lockouts, Unlawful; Penalty. It shall be unlawful for any group of employes of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employes when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to con pire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employes acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor."

"111.63 Enforcement. The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which

any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply."

Section 7 of the National Labor Relations Act (29 U. S. C., Section 157) reads as follows:

"Sec. 7. Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Section 13 of the National Labor Relations Act (29 U. S. C., Section 163) reads as follows:

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

STATEMENT.

The petitioner, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, hereinafter referred to as the Union or Division 998, is an unincorporated, voluntary, labor organization. It is the collective bargaining representative of all of the employees of the Milwaukee Electric Railway and Transport Company, hereinafter referred to as the em-

ployer, in its operating and maintenance departments. These departments employ approximately 2700 employees, who are engaged in supplying the employer's public passenger transportation service (R. 152). The individual petitioners are officers and members of the union who were sued in both capacities (R. 152).

The employer is engaged in the business of furnishing public passenger transportation service by streetcar and motor bus in the City of Milwaukee and its contiguous area, including service to thousands of employees of industrial and commercial establishments, most of which are engaged in the production of goods for interstate commerce or in interstate commerce (R. 153). The rolling stock, equipment, and material used by the employer is procured in great measure from points outside the State of Wisconsin, the total value of the rolling stock recently acquired being in excess of $2,000,000 (R. 140, 153). Its gross operating revenue exceeds $16,000,000 annually and it transports in excess of 100,000,000 passengers annually (R. 141, 152). Any substantial interruption of the business of the employer as a result of a labor dispute would affect interstate commerce (R. 141, 152-154).

The respondent, Wisconsin Employment Relations Board, is an administrative body in which is vested by statute the responsibility of enforcing the provisions of the statute herein involved (R. 128, 151).

The National Labor Relations Board in December, 1947, upon the insistence of the employer that the terms of the National Labor Relations Act be complied with, assumed jurisdiction over the labor relations of the employer, conducted an election among its employees represented by Division 998, and certified that Division 998 was authorized to enter into a "union security" agreement with the employer pursuant to Sections 8 (a) 3 and 9 (e) of the Labor Management Relations Act (R. 141, 153-154).

A contract between Division 998 and the employer covering wages and working conditions of the employees represented by Division 998 expired December 31, 1948 (R. 129, 144). This contract provided, among other things, that should any dispute arise during the terms of the agreement, or over the terms of a new collective bargaining agreement, such dispute would be submitted to final and binding arbitration before a tribunal created by mutual consent and choice of the parties (R. 142). Division 998 offered to settle the controversy relating to the terms of a new agreement by submitting the same to a voluntary arbitration tribunal as aforesaid, but, despite such offer, the contract providing for voluntary arbitration was unilaterally terminated by the employer (R. 142).

Because of the failure of the parties to come to an agreement, and on or about January 3, 1949, the membership of Division 998, by secret ballot, voted to authorize its executive board to call a strike at such time as the board deemed proper. The executive board fixed the date of the strike for 4 o'clock A. M., Wednesday, January 5, 1949, and released an announcement to that effect to the newspapers (R. 130, 152).

The respondent Board immediately thereafter commenced the action which is the subject of these proceedings, alleging in its complaint that the petitioners did instigate, induce, conspire with and encourage persons employed by the employer to engage in a strike and work stoppage which would cause an interruption of an essential service, and that petitioners threatened to and would continue so to do in violation of Section 111.62, Wisconsin Statutes, unless restrained by the court (R. 120-124). The Circuit Court of Milwaukee County issued a temporary restraining order prior to the effective time of the strike (R. 119). Petitioners complied with the order (R. 132).

Petitioners thereafter filed their answer, in which they alleged, among other things, that any judgment granting the relief prayed for in the complaint, and the statutes upon which such a judgment might purportedly be based, would be null and void because contrary to provisions of the United States Constitution and the Constitution of the State of Wisconsin (R. 139-145).

Prior to the filing of such answer, and trial of the case, the following events took place:

A petition for the appointment of a conciliator, pursuant to Section 111.54, Wisconsin Statutes, was filed by the employer, and a conciliator was appointed (R. 143). Division 998 and the employer met with the conciliator, but the employer's final offer during the process of conciliation was less favorable to the union than any offer it had made previous to conciliation (R. 143).

During the process of conciliation, the employer insisted that the matter could only be determined by statutory arbitration, as provided in subchapter 3 of Chapter 111, Wisconsin Statutes, and refused all offers of voluntary arbitration and recommendations of the conciliator (R. 144).

On February 9, 1949, Division 998 filed a charge with the National Labor Relations Board alleging that the employer had committed and was continuing to commit unfair labor practices by failing to bargain in good faith under the provisions of Sections 8 (a) (1) and (5) of the National Labor Relations Act, as amended, because of its conduct as immediately hereinabove set forth. Such charges are now pending before the National Labor Relations Board (R. 144).

When the action came on for trial of the issues, respondent moved for judgment on the pleadings (R. 151, 155).

The Circuit Court entered the judgment as prayed for, perpetually enjoining the petitioners (including the members of petitioning union) from "* * * calling a strike, going out on strike or causing any work stoppage which would cause an interruption of the passenger service of the Milwaukee Electric Railway and Transport Company in the State of Wisconsin, and from instigating, inducing, conspiring with, or encouraging any strike, slowdown or work stoppage which would cause interruption of the public passenger service of said company; all subject to Section 111.64, Wisconsin Statutes" (R. 155-156).

On appeal to the Wisconsin Supreme Court, judgment was affirmed (R. 171). Rehearing was denied (R. 173).

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of the State of Wisconsin erred:

1. In holding that Sections 111.50-111.65, and particularly Section 111.62 thereof, were not in conflict with Sections 7 and 13 (29 U. S. C., Secs. 157 and 163) of the National Labor Relations Act, and, therefore, not in violation of Article I, Section 8, and Article VI of the Constitution of the United States.

2. In holding that Sections 111.50-111.65, and particularly Section 111.62 thereof, were not in violation of the Fourteenth Amendment to the Constitution of the United States.

3. In holding that Sections 111.50-111.65, and particularly Section 111.62 thereof, were not in violation of the Thirteenth Amendment to the Constitution of the United States.

4. In affirming the judgment of the Circuit Court of Milwaukee County directing the entry of a permanent injunction.

REASONS FOR GRANTING THE WRIT.

Petitioners pray that the Writ be granted for the following reasons:

I.

The Statutes and Injunction Are in Conflict With Sections 7 and 13 of the National Labor Relations Act, and, Therefore, in Contravention of Article I, Section 8, and Article VI of the Constitution of the United States.

The employment relationship herein involved comes within the terms of the National Labor Relations Act and within the jurisdiction of the National Labor Relations Board under the admitted and undisputed facts (R. 140-141, 152-154). **National Labor Relations Board v. Baltimore Transit Company,** 140 F. 2nd 51 (C. A. 4, 1944), cert. den., 321 U. S. 796.

At the employer's insistence, the jurisdiction of the National Board was actually invoked and exercised about one year before the present dispute arose (R. 141, 153-154). There is now pending before the National Labor Relations Board a charge filed by petitioners against the employer based upon the instant controversy (R. 144). The respondent and the state courts properly assumed that the National Labor Relations Act would ordinarily apply, but rested their position on what they considered to be the lack of conflict between the state and federal laws as well as the state's superior power in a dispute of this type.

This case thus presents the question of whether the state action "impairs, dilutes, qualifies or in any way subtracts from any of the rights guaranteed and protected by the federal Act" (**Allen Bradley, Local Union 1111, Etc., v. Wisconsin Employment Relations Board,** 315 U. S. 740,

750), or "stands as an obstacle to the accomplishment and execution of the full purposes and objects of collective bargaining" (**Hill v. Florida**, 325 U. S. 538, 542), or "whether Congress occupied this field and closed it to state regulation" (**International Union of United Automobile, Aircraft and Agricultural Workers of America, C. I. O., Etc., et al. v. O'Brien**, case No. 456, October Term, 1949). See also **Plankinton Packing Company v. Wisconsin Employment Relations Board**, 338 U. S. 953; **LaCrosse Telephone Corporation v. Wisconsin Employment Relations Board**, 336 U. S. 18; **Bethlehem Steel Company v. New York State Labor Relations Board**, 330 U. S. 767.

From the statement of facts, the literal language of the statute, and the judgment and the decision of the Wisconsin Supreme Court, it is apparent that the Wisconsin law, as construed by the Wisconsin Supreme Court, imposes a previous restraint, absolute in character and unlimited in duration, upon the exercise by employees of "concerted activities" for the purpose of collective bargaining. For example: A vote by union members upon a minimum standard of wages and working conditions for which they will not work is in effect an "agreement" to strike, which would encourage employees to quit in concert if such minimum standards were not met. The advocacy at a union meeting (as here) of the adoption of a resolution to strike would be an inducement or encouragement to strike. And, of course, the actual concerted quitting is made a violation. All these acts are punishable as misdemeanors by the Wisconsin Statute.

The Wisconsin law makes the strike in itself an unlawful act. It thus applies, in substance, the conspiracy doctrine to the strike; it makes unlawful the agreement, or advocacy of action when done by two or more in concert, although the action would be lawful if done by any one of them alone.

This legislative abrogation of the right to strike is absolute, without regard to the reasons for, or the ends sought by, the concerted activity, and without regard for the fact that in every other respect the strike is accompanied by perfect obedience to law.

This prohibition on the right to strike does violence to the entire concept of the collective bargaining process which, realistically, is the process by which employees through self-organization, although under considerable economic compulsion to continue to work, are able to deal on terms approaching equality with the employer for the aggregate of the employees' services because of the employees' legal right and actual ability to quit work in concert.

Obviously, if the employees are not legally free to quit in concert, or to agree among themselves upon minimum conditions which they will accept for continued service, or to advocate concerted quitting in a union meeting, or to notify the employer of their decision, such employees are not in a position to bargain for their aggregate services.

One cannot bargain for that which he does not have the legal power to withhold.

Accordingly, the conflict between the state and federal statutes which petitioners herein assert arises out of the alleged right of the state to impose criminal penalties and to restrain, by permanent injunction, the calling of a strike, going out on a strike, and peaceful strike activities for improved wages, hours, and working conditions, absent a contractual obligation not to strike, as contrasted with the federal statutes which, under the same circumstances, impose no such absolute prohibition on the right to strike but, on the contrary, firmly protect engaging in concerted activities for the purpose of collective bargaining or other

mutual aid and protection. **National Labor Relations Board v. Mackay Radio and Telegraph Co.**, 304 U. S. 333, 345-348; **National Labor Relations Board v. Fansteel Corp.**, 306 U. S. 240, 256.

The recent decision of this Court in the case of **International Union, etc., v. O'Brien** (Case No. 456, October Term, 1949), is completely determinative of the issue. In that case a state law requiring majority approval of a strike in a secret ballot vote conducted by the state, as applied to a manufacturing concern subject to the federal law, was held irreconcilable with the federal law which contained no such limitations, express or implied.

This Court pointed out that in the federal Act "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." It was also there held, particularly in the light of Congressional reports and debates, that none of the provisions of the National Labor Relations Act "can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation."

Significantly, in the **O'Brien** case, supra, this Court rejected Michigan's reliance on the case of **International Union, United Automobile Workers of America, A. F. of L., Local 232, et al. v. Wisconsin Employment Relations Board**, 336 U. S. 245, a case also principally relied on by the Wisconsin Court in the instant case. In distinguishing the earlier Wisconsin case this Court emphasized that its decision there rested upon the "coercive" nature of the activities involved, and "was not concerned with the traditional peaceful strike for higher wages."

In marked contrast to this Court's reading of its decision in the **International Union, Local 232**, case, supra,

the Wisconsin Court apparently construed such case as placing within the power of the state the exclusive authority to determine what kinds of strike may be permitted, and what kind of strikes may be prohibited. The **O'Brien** case, supra, is directly contrary to the Wisconsin Court's interpretation.

Of further significance is the fact that the decision of the Wisconsin Supreme Court has completely overlooked the statement by the majority of this Court in the case of **International Union, Local 232, vs. Wisconsin Employment Relations Board et al.**, supra, that "no longer can any state, as to relations within reach of the act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert."

Section 111.62 does expressly make concerted activities, otherwise lawful, a criminal conspiracy and punishable as such.

The Wisconsin Court apparently also felt that it was proper for the state to consider the nature of the industry involved, and upon determining that strikes in certain industries were more inimical to the welfare of the people of the state than were strikes in other industries, single out those industries for its own independent regulation of the labor management relationship. In this it committed its basic error.

The National Labor Relations Board never considered that the federal act, before its amendment, permitted of any distinction between private industries and public utilities, particularly with respect to the right to strike. It early held that "neither in that Section (Section 13) nor in any other does the Act distinguish between public utility employees and those otherwise employed." **In the**

Matter of El Paso Electric Company, 13 N. L. R. B. 213, 240.

Nor did the proponents of the 1947 amendments to the Act have any intention of excluding from its protection the employees of public utilities. This is conclusively demonstrated by the following statements made by Senator Taft, the co-author of the amending bill, and its manager on the floor of the Senate, when presenting the majority report of the Senate Committee on Labor and Public Welfare (93 Cong. Rec., 3835 [1947]):

> "Basically, I feel that the Committee feels, almost unanimously that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. * * *
>
> "We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices and working conditions. But if we impose compulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come I do not see how in the end we can escape a collective economy. * * *
>
> "It is suggested that we might do so in the case of public utilities, and I suppose that the argument is stronger there, because we fix the rate of public utilities, and we might, I suppose, fix the wages of public

utility workers. Yet we have hesitated to embark even on that course, because if we once begin a process of the Government fixing wages, it must end in more and more wage fixing and finally Government price fixing. It may be a popular thing to do. Today people seem to think that all that is necessary to do is to forbid strikes, fix wages and compel men to continue working, without consideration of the human and constitutional problems involved in that process."

"If we begin with public utilities it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the Bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours and working conditions after proper opportunity for mediation."

Thus, both the National Labor Relations Board, under the early Act, and the sponsors and authors of the amended Act felt that basic to the purposes to be accomplished by the Act was the protection of the right to strike in aid of collective bargaining and other mutual aid and assistance even though the exercise of such right in some circumstances may involve inconvenience and hardship to the public.

The only limitations imposed upon such right by the Congress were:

1. The requirement of a sixty (60) day notice when a contract was in effect [Section 8 (d)].

2. Prohibition of certain types of strikes which were for the purpose of accomplishing objectives which were considered to be against public policy [Section 8 (b) (4)].

3. Temporary delay of strikes which the President of the United States believes may imperil the national health or safety (Section 206-210).

In view of these specific exclusions from the general policy of the law, and in light of the legislative history with respect to attempts to prohibit strikes and to require compulsory arbitration in public utilities, it is clear that state action in the instant type of situation is absolutely precluded.

It is also clear that if a threatened strike in a public utility in any city or state should create a condition which falls within Section 206-210, such controls as the Congress has described would be proper and permissible and would thus afford a remedy to the state. For example: if, in a large metropolitan and industrial community such as Milwaukee County, a threatened strike of the employees of the company furnishing electric power to the area would so seriously affect the normal commercial, and industrial life of the area so as to have wide-spread repercussions, the President of the United States has the authority to intercede. It is not likely that such intercession will be withheld merely because the immediate incidence of the dispute falls most heavily on a particular local area. In our highly integrated and complicated economy any serious economic disruption, or danger to health and morals, in a local area could very well rise to the rank of national emergency. On the other hand, if the community affected were a small one, with little commercial or industrial activity, then either the hardships or inconveniences which might arise are subordinated to the national policy of encouragement and implementation of collective bargaining, or, what is more likely, the employment relationship involved will be one which does not come within the scope of the National Labor Relations Act.

In only one instance has the Congress permitted states to adopt a policy with respect to labor management relations inconsistent with that of its general policy. It did so with respect to the "union shop" by permitting the imposition by the states of greater restrictions on contracts requiring union membership as a condition of employment [Section 14 (b)]. This selective treatment demonstrates that Congress was not unaware of state problems when it enacted the law, and further demonstrates that where Congress felt that greater latitude should be granted to the states, it did so directly and expressly.

Even when there is no conflict between state and federal law, the state can acquire jurisdiction only if it is expressly ceded by the National Labor Relations Board, and then only in a certain type of industry, predominantly local in character [Section 10 (a)].

Had Congress intended that states could, separately and more restrictively, handle problems which arise in public utilities or other essential industries which are subject to the coverage of the federal law, it would have so done. The history of the legislation and the congressional debates indicate both its awareness of the problem and the reasons why it did not not do so.

II.

The Wisconsin Law Is in Violation of the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States is violated by the statute and judgment in a number of respects:

(a) The Wisconsin law violates the equal protection clause of the Fourteenth Amendment, since it excludes

from coverage railroads and railroad employees. It thus arbitrarily declares that not all essential service or employers and employees engaged in all essential service are subject to its regulation. Since the law does not distinguish between interstate and intrastate carriers, the classification cannot be justified on the ground that superior federal regulation embraced by the Federal Railway Labor Act fills the gap.

(b) The Wisconsin law deprives working men of their liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The liberty which is embraced in that amendment is a civil liberty of which persons may not be deprived without due process of law. **Allgeyer v. State of Louisiana**, 165 U. S. 578; **Grosjean v. American Press Company**, 297 U. S. 233. The right to work is such liberty. **Truax v. Raich**, 239 U. S. 33, 41.

In **Wolf Packing Company v. Court of Industrial Relations**, 267 U. S. 552, this Court rejected, as invalid under the Fourteenth Amendment, a state statute which prohibited employees from inducing others to quit, or combine to do so, in certain designated industries which the state felt vitally affected the health and welfare of its citizens. The Court quoted its earlier decision, 262 U. S. 522, to the effect that the Act curtailed the right of the employee "to contract about his affairs. This is part of the liberty of the individual protected by the guarantee of the due process clause of the Fourteenth Amendment."

Prohibitions on the right to strike have been held to violate the Fourteenth Amendment in **Alabama Federation of Labor v. McAdory**, 18 So. (2) 810 (Ala.); **American Federation of Labor v. Bain**, 106 P. (2d) 544 (Oregon); and **Stapleton v. Mitchell**, 60 F. Supp. 51 (D. Kansas).

Finally, the law, as specifically applied and interpreted under the facts of this case, imposes an absolute, previous restraint on petitioners' rights of free speech and assembly in a situation where neither improper means nor improper objectives were involved. **Thornhill v. Alabama**, 310 U. S. 88; **Carlson v. California**, 310 U. S. 106; **American Federation of Labor v. Swing**, 312 U. S. 321; **Thomas v. Collins**, 323 U. S. 516.

(c) Section 111.62 of the Wisconsin Statutes further violates the due process clause of the Fourteenth Amendment, because it is indefinite and vague and requires working men to speculate on what acts will result in penal sanction. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. **United States v. Brewer**, 139 U. S. 278; **Weeds v. United States**, 255 U. S. 109; **United States v. L. Cohen Grocery**, 255 U. S. 81; **Connaly v. General Construction Company**, 269 U. S. 385.

The Wisconsin law fails to meet this test in a number of respects, but principally because whether or not the contemplated action of the employees will cause an "interruption" within the meaning of the Act is not always ascertainable. Not all strikes or work stoppages might cause such an interruption. Whether a particular strike may cause such interruption will be dependent upon the ease of replacement of striking employees, the nature of the work performed by such employees, and the number of employees who might respond to the strike call.

The Wisconsin law, in Section 111.54, imposes the duty upon the Wisconsin Employment Relations Board to determine in the first instance whether or not a failure to settle the dispute will cause or is likely to cause the interruption of essential service.

We thus have the peculiar situation that working men are required, before they engage in any concerted activities by way of strike, work stoppage or slowdown, to determine whether or not such activities would cause an interruption of an essential service, while, at the same time, the Legislature has recognized that not all of such activities would cause an interruption, and has placed within the jurisdiction of an administrative agency the power, as well as the duty, to determine whether in a particular case or under particular circumstances there would be such an interruption.

III.

The Wisconsin Statutes and the Judgment Are in Violation of the Thirteenth Amendment to the Constitution in That They Impose Involuntary Servitude.

The Thirteenth Amendment to the Constitution of the United States embraces compulsory service "of whatever name and form and all its badges and incidences." **Bailey v. Alabama**, 219 U. S. 219, 241. It comprehends the "maintenance of a system of completely free and voluntary labor throughout the United States." **Pollock v. Williams**, 322 U. S. 4, 17.

In the case of **International Union, Etc., v. Wisconsin Employment Relations Board**, 336 U. S. 245, the case principally relied upon by the Wisconsin Court in this case, the majority opinion of this Court rejected the involuntary servitude argument therein made with respect to an injunction, but pointed out that

> "Nothing in the Statute or the order makes it a **crime** to abandon work individually (compare **Pollock v. Williams**, 22 U. S. 4, 88 L. Ed. 1095, 64 S. Ct. 792) **or collectively.**" (Emphasis ours.)

But Section 111.62 does make it a crime to abandon work collectively and the judgment of the Wisconsin Courts enjoins the commission of that offense.

CONCLUSION.

Some eleven states have now adopted,[1] in one form or another, laws which provide for compulsory arbitration or government seizure, and which prohibit the right to strike in certain industries over which the National Labor Relations Board has jurisdiction and has asserted jurisdiction. In such states a great number of employees, although assured by congressional action of their right to strike for improved wages, hours and working conditions, and although assured by congressional action of the right to bargain collectively for their mutual aid and protection, find that both the right to strike and the right to bargain collectively in its true sense have been denied to them.

In all of such states a large number of employees find that any action to improve their working status has been denied the protection of the Thirteenth and Fourteenth Amendments to the Constitution of the United States, subject only to a highly theoretical right to quit work as individuals.

This case, therefore, is one of profound importance, not only to those employees, employers and public officials in the states which have passed, or are contemplating

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1 Florida Laws (1947), Chapter 23,911; Indiana Act (1947), Chapter 341; Kansas, General Statutes (1935), Chapter 44, Article 6; Massachusetts, Annotated Laws (1947), Chapter 150 B; Michigan Statutes Annotated (1947), Section 17.454; Nebraska Laws (1947), Chapter 178; New Jersey Laws (1947), Chapter 75; North Dakota Revised Code, Para. 37-0106; Pennsylvania Laws (1947), No. 485; Virginia Acts (1947), Chapter 9; Wisconsin Laws (1947), Chapter 414.

For brief summary and observations on these laws see Roberts, Compulsory Arbitration of Labor Disputes in Public Utilities, 1 Labor Law Journal (C. C. H.) 694 (June, 1950).

passage of, similar legislation, but also to the citizens of this country generally.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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BRIEF FOR THE PETITIONERS

No. 329.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL, CHARLES BREHM, THOMAS MURACH, RAYMOND KNUTSON, JACK WERY, JOE DERSINZSKI, HOWARD LYNCH, HERMAN WEBER, PAUL BREHM, PAUL KRAFT, STEVE MALICK, WILLIAM BUCHE, GEORGE SLOAN, EDWIN BECKER and OTHMAR MISCHO,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin.

BRIEF FOR THE PETITIONERS.

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vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin.

BRIEF FOR THE PETITIONERS.

This action was commenced by the filing of a complaint in the Circuit Court for Milwaukee County by the respondent Wisconsin Employment Relations Board, it being alleged that petitioners instigated, induced, conspired with, and encouraged employees of a public utility

employer to engage in a strike in violation of Wisconsin Statutes (R. 120-124). An ex parte temporary restraining order was issued (R. 119) which later was made permanent (R. 155-156). On appeal to the Wisconsin Supreme Court the injunction was affirmed (R. 163). Motion for rehearing was denied (R. 173).

OPINIONS BELOW

The opinion of the Circuit Court for Milwaukee County (R. 101-118) is unreported. The opinion of the Wisconsin Supreme Court (R. 163-171) is reported in 257 Wis. 43, 42 N. W. (2) 471.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C.

In this case the validity of certain statutes of the State of Wisconsin, to-wit: Sections 111.50-111.65, particularly Section 111.62 thereof, and a judgment based on such statutes, are drawn in question upon the ground that such statutes and judgment, on their face, and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to:

(a) Article I, Section 8, and Article VI of the United States Constitution, in that they are contrary to and in violation of rights conferred and duties imposed by superior federal legislation, to-wit: the Labor Management Relations Act, 61 Stat. 136, 29 U. S. C. Supp., Sections 141-197;

(b) Section 1 of the Thirteenth Amendment to the Constitution of the United States in that they impose involuntary servitude; and

(c) Section 1 of the Fourteenth Amendment to the United States Constitution, in that they deprive petitioners of liberty and property without due process of law, and deprive petitioners of the equal protection of the laws.

The decision of the Wisconsin Supreme Court, the last resort of all causes in the State of Wisconsin, was in favor of the validity of the statutes and judgment.

Petitioners argued before the Circuit Court of Milwaukee County (see answer, Paragraph XII, R. 145), and before the Supreme Court of the State of Wisconsin (see decision, R. 168, 169, 171), that Sections 111.50-111.65 of the Wisconsin Statutes, and more particularly Section 111.62, as construed, were unconstitutional and void and of no effect whatsoever, because they were repugnant to the provisions of the United States Constitution referred to immediately above. The federal question of whether the Wisconsin statutes in question, and the judgment purportedly based on such statutes, violated the Constitution of the United States was raised therefore before every tribunal before which argument was heard.

The Supreme Court of the State of Wisconsin specifically held that neither the statutes nor the judgment based on such statutes, as construed, deprive the petitioners of any rights guaranteed under the Constitution of the United States. The Court stated:

> "The second contention, that the law is repugnant to the National Labor Relations Act and is therefore unconstitutional, has been answered in the case of **International Union, Local 232, et al., v. Wisconsin Employment Relations Board et al.**, 336 U. S. 245" (R. 168).

Answering the contention that the statutes and judgment violated rights under the Fourteenth Amendment, the Court stated:

> "The prohibitions of the statute under review are against the actions of more than one individual when acting in concert. We cannot see that any individual rights are infringed upon: If there is such infringement, it must be recognized that it is in recognition of the paramount rights of the public. The United States Supreme Court recognized this in the case of **International Union, Local 232, et al., v. Wisconsin Employment Relations Board et al.**, supra, page 259, when it stated: * * *" (R. 170).

In answering the contention that the statutes and judgment were in violation of the Thirteenth Amendment, the Court stated:

> "Instead of being subject to involuntary servitude the employees of public utilities enjoy certain advantages, such as continuity of employment, that were mentioned above" (R. 171).

Thus the Wisconsin Supreme Court has held that the taking of a strike vote, the announcement of intention to strike, and the strike itself, are in violation of the Wisconsin Statutes, subject to restraint by the Wisconsin Courts, and that such restraint is not in violation of any provision of the Constitution of the United States.

QUESTION PRESENTED

Whether a state may, by statute and injunction, prohibit strikes by employees of "public utility" employers when such strikes will result in an "interruption of an essential service."

STATE AND FEDERAL STATUTES INVOLVED

The pertinent state statutory provisions have been printed in the Appendix to the Petitioners' Brief in the case of **Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, et al., Petitioners, v. Wisconsin Employment Relations Board et al., Respondents,** Case No. 330, October Term, 1950, a companion case to this one.

Particularly relevant herein are Sections 111.62 and 111.63 which read as follows:

> "111.62. Strikes, Work Stoppages, Slowdowns, Lockouts, Unlawful; Penalty. It shall be unlawful for any group of employes of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employes when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employes acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor."

> "111.63 Enforcement. The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which

any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply."

Section 7 of the National Labor Relations Act (29 U. S. C. Supp., ¶ 147) reads as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Section 13 of the National Labor Relations Act (29 U. S. C., Section 163) reads as follows:

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

STATEMENT

The petitioner, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, hereinafter referred to as the Union or Division 998, is an unincorporated, voluntary, labor organization. It is the collective bargaining representative of all of the employees of the Milwaukee Electric Railway and Transport Company, hereinafter referred to as the employer, in its operating and maintenance departments. These departments employ approximately 2700 employees, who are engaged in supplying the employer's public passenger transportation service (R. 152). The individual petitioners are officers and members of the union who were sued in both capacities (R. 152).

The employer is engaged in the business of furnishing public passenger transportation service by streetcar and motor bus in the City of Milwaukee and its contiguous area, including service to thousands of employees of industrial and commercial establishments, most of which are engaged in the production of goods for interstate commerce or in interstate commerce (R. 153). The rolling stock, equipment, and material used by the employer is procured in great measure from points outside the State of Wisconsin, the total value of the rolling stock recently acquired being in excess of $2,000,000 (R. 140, 153). Its gross operating revenue exceeds $16,000,000 annually and it transports in excess of 100,000,000 passengers annually (R. 141, 152). Any substantial interruption of the business of the employer as a result of a labor dispute would affect interstate commerce (R. 141, 152-154).

The respondent, Wisconsin Employment Relations Board, is an administrative body in which is vested by statute the responsibility of enforcing the provisions of the statute herein involved (R. 128, 151).

The National Labor Relations Board in December, 1947, upon the insistence of the employer that the terms of the National Labor Relations Act be complied with, assumed jurisdiction over the labor relations of the employer, conducted an election among its employees represented by Division 998, and certified that Division 998 was authorized to enter into a "union security" agreement with the employer pursuant to Sections 8 (a) 3 and 9 (e) of the Labor Management Relations Act (R. 141, 153-154).

A contract between Division 998 and the employer covering wages and working conditions of the employees represented by Division 998 expired December 31, 1948 (R. 129). This contract provided, among other things, that should any dispute arise during the terms of the agreement, or over the terms of a new collective bargaining agreement, such dispute would be submitted to final and binding arbitration before a tribunal created by mutual consent and choice of the parties (R. 142). Division 998 offered to settle the instant controversy relating to the terms of a new agreement by submitting the same to a voluntary arbitration tribunal as aforesaid, but, despite such offer, the contract providing for voluntary arbitration was unilaterally terminated by the employer (R. 142).

Because of the failure of the parties to come to an agreement, and on or about January 3, 1949, the membership of Division 998, by secret ballot, voted to authorize its executive board to call a strike at such time as the board deemed proper. The executive board fixed the date of the strike for 4 o'clock A. M., Wednesday, January 5, 1949, and released an announcement to that effect to the newspapers (R. 130, 152).

The respondent Board immediately thereafter commenced the action which is the subject of these proceedings, alleging in its complaint that the petitioners did instigate, induce, conspire with and encourage persons em-

ployed by the employer to engage in a strike and work stoppage which would cause an interruption of an essential service, and that petitioners threatened to and would continue so to do in violation of Section 111.62, Wisconsin Statutes, unless restrained by the court (R. 120-124). The Circuit Court of Milwaukee County issued a temporary restraining order prior to the effective time of the strike (R. 119). Petitioners complied with the order (R. 132).

Petitioners thereafter filed their answer, in which they alleged, among other things, that any judgment granting the relief prayed for in the complaint, and the statutes upon which such a judgment might purportedly be based, would be null and void because contrary to provisions of the United States Constitution and the Constitution of the State of Wisconsin (R. 139-145).

Prior to the filing of such answer, and trial of the case, the following events took place, and their occurrence was set forth in the answer.

A petition for the appointment of a conciliator, pursuant to Section 111.54, Wisconsin Statutes, was filed by the employer. A conciliator was appointed (R. 143). Division 998 and the employer met with the conciliator, but the employer's final offer during the process of conciliation was less favorable to the union than any offer it had made previous to conciliation (R. 143).

During the process of conciliation, the employer insisted that the matter could only be determined by statutory arbitration, as provided in subchapter 3 of Chapter 111, Wisconsin Statutes, and refused all offers of voluntary arbitration and recommendations of the conciliator (R. 144).

On February 9, 1949, Division 998 filed a charge with the National Labor Relations Board alleging that the em-

ployer had committed and was continuing to commit unfair labor practices by failing to bargain in good faith under the provisions of Sections 8 (a) (1) and (5) of the National Labor Relations Act, as amended, because of its conduct as immediately hereinabove set forth. Such charges are now pending before the National Labor Relations Board (R. 144).

When the action came on for trial of the issues, respondent moved for judgment on the pleadings (R. 151, 155). The Circuit Court, without taking any testimony, entered the judgment as prayed for, perpetually enjoining the petitioners (including the members of petitioning union) from "• • • calling a strike, going out on strike or causing any work stoppage which would cause an interruption of the passenger service of the Milwaukee Electric Railway and Transport Company in the State of Wisconsin, and from instigating, inducing, conspiring with, or encouraging any strike, slowdown or work stoppage which would cause interruption of the public passenger service of said company; all subject to Section 111.64, Wisconsin Statutes" (R. 155-156).

On appeal to the Wisconsin Supreme Court, judgment was affirmed (R. 163). Rehearing was denied (R. 173).

SPECIFICATION OF ERRORS

The Supreme Court of the State of Wisconsin erred:

1. In holding that Sections 111.50-111.65, and particularly Section 111.62 thereof, were not in conflict with the Labor Management Relations Act, 1947, 61 Stat. 136, and, therefore, not in violation of Article I, Section 8, and Article VI of the Constitution of the United States.

2. In holding that Sections 111.50-111.65, and particularly Section 111.62 thereof, were not in violation of the Fourteenth Amendment to the Constitution of the United States.

3. In holding that Sections 111.50-111.65, and particularly Section 111.62 thereof, were not in violation of the Thirteenth Amendment to the Constitution of the United States.

4. In affirming the judgment of the Circuit Court of Milwaukee County directing the entry of a permanent injunction.

SUMMARY OF ARGUMENT

I

The Wisconsin statute and judgment violate the Commerce clauses of the Constitution, because they have been applied to an industry and a relationship which are clearly covered by the National Act, and in which state action has been precluded either because of complete congressional occupation of the field, or because of conflict with the National Act.

A

Congress has completely occupied the field of peaceful strikes for higher wages in industries which affect interstate commerce. **International Union of United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O., etc. v. O'Brien, etc.**, 339 U. S. 454 (1950). If states are powerless to delay strikes for higher wages, pending exhaustion of state mediation processes, and if they are powerless to condition the legality of such strike on majority-voted approval, a fortiori, Wisconsin cannot absolutely prohibit the same type of strike merely because of the accident of the industry in which it occurs.

1. Contrary to the state's contention, Title II of the Labor Management Relations Act, 1947, affords no basis for distinguishing the holding in the **O'Brien** case, supra, since Title II was expressly considered by the court. In referring to Sections 206-210 of that Title and Section 8 (b) (4) of Title I the court said, "None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages." This conclusion of the court is supported by the legislative history, congressional debates, and committee reports.

An attempt to amend the final bill so as to make all titles separate pieces of legislation was rejected by the

Senate (93 Cong. Rec. 4264) because it was considered that all provisions and titles were mutually interrelated and intertwined as a complete legislative program dealing with collective bargaining, and because the Act was predicated on the theory of the Wagner Act that free collective bargaining was the solution of the labor problem in the United States (93 Cong. Rec. 4261-4262, 7536-7537).

The legislative history also shows that H. R. 3020 (the Hartley bill) as it passed the House dealt specifically with "transportation and public utilities" in which strikes would imperil "the public health and safety," but such broad coverage was eliminated by the Senate and concurred in by the House in the final Act. Additionally, five identical bills (H. R. 17, 34, 68, 75, 76) were introduced in the House for the purpose of permitting state and local governments to handle strikes endangering the public health and safety, but were abandoned in favor of the legislation that was passed. Extension of Remarks of Rep. Case, 93 Cong. Rec. A.-1007.

The report of the Senate Committee on Labor and Public Welfare (S. Rep. No. 105, 80th Cong., 1st Sess., p. 13) clearly pointed out that compulsory arbitration proposals were considered but not adopted because of past experiences of the Federal Government. In support of such report and defending the Bill, Senator Taft, its co-author and manager on the floor of the Senate, expressed the Senate Committee's belief that the solution of the country's labor problems must rest on a free economy and on free collective bargaining; that the bill was based on that proposition; that the right to strike for improvement of wages, hours and working conditions was protected in spite of the inconvenience, and in some cases danger, to the people of the United States; and that no exception was made with respect to public utilities. 93 Cong. Rec. 3835.

Consistent with this policy, the only limitations put on the right to strike were to require sixty-day notices when

a contract was in effect [Section 8 (d)]; prohibition of strikes for certain enumerated purposes [Section 8 (b) (4)]; and temporary delay of strikes which the President of the United States believes may imperil the national health and safety (Sections 206-210). Where state policy was to have supremacy, specific provision was made in Section 14 (b); and where state assistance in the mediation process was thought advisable, it was permitted by Sections 8 (d), 202 (c) and 203 (b).

2. There is not any basis for treating privately-owned public utilities as having a different or preferred status under the federal Act. They are not excluded from the definitions [Section 2 (2)], which by Section 501 (3) are incorporated in all titles of the law. They were never excluded by the courts. **Consolidated Edison Co. v. National Labor Relations Board**, 305 U. S. 197, 221-223. And they were never excluded by the National Board, even in strike situations. **In the Matter of El Paso Electric Company**, 13 N. L. R. B. 213, 240.

3. There is no basis for reliance on the decision in **International Union, United Automobile Workers, A. F. of L., v. Wisconsin Employment Relations Board**, 336 U. S. 245, since the **O'Brien** case, supra, makes it clear that such decision did not deal with the traditional peaceful strike for higher wages, but with activities similar to the "sit-down" and to "labor violence."

B

Even if there were not complete congressional occupation of the field the Wisconsin statute could not stand since the two laws, as they deal with "emergency" situations, cannot consistently stand side by side. **Hill v. Florida**, 325 U. S. 538.

1. The very process of collective bargaining assumes the ability of the collective group to approach equality with

their employer by having the legal right to leave their work in concert. **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, 209. But under the Wisconsin statute and judgment the strike is not permitted to perform its function as an aid to collective bargaining. By contrast, analysis of the provisions of Title II demonstrates congressional emphasis on the policies of voluntarism and free collective bargaining to the extent that even in narrowly-defined national emergency situations, a strike or threatened strike is only temporarily delayed, but not prohibited (Sections 206-210).

2. The Wisconsin law operates on a different timetable in its mediation and conciliation process than does the federal law. That it actually interferes with the federal mediation and conciliation process appears from the First Annual Report of the Director of the Federal Mediation and Conciliation Service, who states that because of laws of this type the Service has refrained from taking the leading role in mediation of disputes, which otherwise are covered by the Congressional language. First Annual Report, Federal Mediation and Conciliation Service, p. 39 (1949).

3. Since the Wisconsin law purports to deal with "effects" of strikes in certain industries, as do Sections 206-210, there should be consistency in the tests applied. However, the Wisconsin law does not purport to deal with "emergency" situations. It broadly covers all "interruptions" of an "essential service," whether such interruption creates an emergency or not. The statute defines "essential service" [Section 111.51 (2)]; determination if an "interruption" will occur is made by the Wisconsin Board (Section 111.54). No effort is made to weigh the effect of the "interruption" on the type of "essential service."

On the other hand, the invoking of Sections 206-210 of the national law is dependent upon whether a strike will "imperil the national health and safety," a fact to be de-

termined in each case as it arises, both administratively (Section 206) and judicially (Section 208).

4. The possibility of conflict and overlapping jurisdiction in the application of the state and federal laws are real and many. Both might very well be applied to the same situation in an actual strike situation, yet they could not be applied consistently.

C

Although it is argued that reversal of the judgment will unduly prejudice the state there is no merit to such argument since:

(1) the Wisconsin law does not purport to deal with "disaster" or "catastrophe" situations, nor is there the slightest suggestion that the state was confronted with such situation here; (2) if a strike in a major metropolitan area like Milwaukee would cause a critical situation, it is not likely that federal intervention will be withheld merely because the incidence of the dispute may fall most heavily on a particular local area; (3) strikes in public utilities occur rarely, so rarely that only eleven states have attempted any special treatment of the problems; (4) in those rare situations where a serious condition may arise, and if the federal government doesn't intervene, supremacy of the federal law might be averted by state seizure which would then remove the state, as an employer, from the coverage of the federal statute; (5) Congress has already considered the argument but rejected it in the national interest.

II

The absolute and sweeping restraint of the statute and injunction are in violation of the due process clause of the Fourteenth Amendment since they embrace restraints on fundamental human liberties such as the right of free

speech, public assemblage, freedom of contract and freedom to dispose of one's labor. **Wolff Packing Co. v. Court of Industrial Relations**, 262 U. S. 522. See **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184; **Near v. Minnesota**, 283 U. S. 697; **Thomas v. Collins**, 323 U. S. 516. On the other hand, this case is to be distinguished from **Wilson v. New**, 243 U. S. 332, which dealt with an acute national crisis, and which, as was later pointed out in the **Wolff** case, supra, "went to the borderline". Since the Wisconsin law combines a restraint on strikes with compulsory arbitration, and is applicable to all "interruptions" of an "essential service", it cannot meet the test of "clear and present danger". **Wolff Packing Co. v. Court of Industrial Relations**, supra.

There is also violation of due process in the vague language employed. To impose upon working men the duty to speculate on whether contemplated action will cause an "interruption" in a situation where the efficacy of the strike cannot be weighed violates the first essential of due process. **United States v. L. Cohen Grocery Co.**, 255 U. S. 81.

III

The Wisconsin statute and judgment impose involuntary servitude in violation of the Thirteenth Amendment since for all practical purposes the public utility worker does not possess the individual right to quit. The nature of his employment is such that the special skills required for a public utility employer cannot readily be used for other employers in the area covered by the monopoly. There is thus "no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." **Pollock v. Williams**, 322 U. S. 4, 17-18.

ARGUMENT

I

THE STATUTE AND INJUNCTION REPRESENT AN ATTEMPTED EXERCISE OF STATE POWER IN VIOLATION OF ARTICLE I, SECTION 8, AND ARTICLE VI OF THE CONSTITUTION OF THE UNITED STATES

In the instant case the employer and its employment relationships are clearly within the scope of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., Supp. II, 141-197, and subject to the jurisdiction of the National Labor Relations Board (R. 108, 140-141, 153). **National Labor Relations Board v. Baltimore Transit Company**, 140 F. 2d 51 (C. A. 4, 1944), cert. den., 321 U. S. 796; **W. C. King d/b/a Local Transit Lines**, 91 N. L. R. B. No. 96 (1950). In the last cited case the National Labor Relations Board reaffirmed its jurisdiction over public utilities generally, and local transit companies specifically, saying:

> "Our experience has shown that public utilities, including public transit systems of the type here involved, have such important impact on commerce as to warrant our taking jurisdiction over all cases involving such enterprises, where they are engaged in commerce or in operations affecting commerce, subject only to the rule of de minimis. Accordingly, we will hereafter assert jurisdiction in all other cases involving public utilities and public transit systems of the type here involved, subject only to the foregoing limitation."

The coverage of the national Act is further and conclusively demonstrated in this case since, at the employer's insistence, the jurisdiction of the National Labor Relations

Board was actually invoked and exercised about one year before the present dispute arose (R. 141, 153-154); and there is now pending before the national Board a charge filed by petitioners against the employer based upon the instant controversy (R. 144).

For all of the above reasons the respondent and the state courts properly assumed that the National Labor Relations Act would ordinarily apply, but rested their position on what they considered to be the lack of conflict between the state and federal laws, as well as upon the state's superior power in a dispute of this type.

This case thus presents the question of whether the state action "impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act" (**Allen Bradley Local No. 1111, etc., v. Wisconsin Employment Relations Board**, 315 U. S. 740, 750); or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of Congress (**Hill v. Florida**, 325 U. S. 538, 542); or whether "Congress occupied this field and closed it to state regulation" (**International Union of United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O., etc., v. O'Brien, etc.**, 339 U. S. 454. See also **Plankinton Packing Co. v. Wisconsin Employment Relations Board**, 338 U. S. 953; **LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board**, 336 U. S. 18; **Bethlehem Steel Co. v. New York State Labor Relations Board**, 330 U. S. 767).

A

Congress Has Completely Occupied the Field in Which the State Law Attempts to Operate

Since the recent decision of this court in the case of **International Union etc. v. O'Brien**, 339 U. S. 454 (1950) (hereinafter called the **O'Brien** case), it is no longer open

to question that Congress in enacting the Labor Management Relations Act, 1947, manifested its intention to exclude the states from adopting or enforcing regulatory or prohibitory legislation with respect to peaceful strikes for higher wages where interstate commerce is affected. In that case a state law requiring majority-voted approval of such type of strike was declared beyond the state's power of enforcement because in violation of the Commerce Clause of the Constitution. It was held that by enactment of the Labor Management Relations Act, 1947, " * * * Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." It was further held that none of the provisions of the federal Act (including Sections 206-210 of Title II) could " * * * be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation." 339 U. S., at p. 457.

If the states are powerless to delay strikes for higher wages pending the intervention of state mediation agencies, and if they are powerless to restrain or to make criminal the calling of, or going out on, such strikes unless a majority of the employees involved have so voted by secret ballot, it would seem, a fortiori, that the states cannot absolutely prohibit such strikes. Yet Wisconsin here claims the right to do so. It claimed such right in the instant case prior to the decision of this Court in the **O'Brien** case, supra, which was announced six (6) days after announcement of the state court's decision. Although this court's decision was immediately called to the attention of the state court in petitioners' brief in support of their Motion for Rehearing, the Motion for Rehearing was denied without opinion.

It is apparent, however, from the Wisconsin court's subsequent decision in the case of **Wisconsin Employment Relations Board v. Milwaukee Gas Light Co. et al.**, not

yet officially reported (pending here as Case No. 438, October Term, 1950), and from the respondent's brief opposing certiorari in this case, that the state believes that the **O'Brien** case was decided under Title I of the Act, whereas consideration of this case in the light of Title II of the Act yields a contrary result. It further appears that the state relies on an alleged distinction between what the state's powers may be in dealing with labor management relations in privately-owned public utilities as contrasted with its powers in dealing with other privately-owned enterprises; and the state continues to rely on the decisions in **International Union, United Automobile Workers, A. F. of L., etc., et al. v. Wisconsin Employment Relations Board,** 336 U. S. 245, as giving unlimited power to the states in controlling strikes.

Those points will be considered in order below.

1. Title II cannot be separated from Title I, nor does independent consideration of Title II result in any different conclusion with respect to the state's power to act.

While it is true that Title II was not directly involved in the **O'Brien** case, it was nevertheless explicitly considered by the court in that case and was an important consideration in the court's conclusion. That is apparent from the decision itself.

In footnote 3 to the court's observation that in both the National Labor Relations Act and the Labor Management Relations Act, 1947, Congress expressly recognized the right to strike, reference is made to Senator Taft's statement (93 Cong. Rec. 3835) which dealt in great detail with congressional consideration of imposing limitations on the right to strike in public utilities, and which concluded that nothing was done "to outlaw strikes for basic wages, hours and working conditions after proper opportunity for mediation."

Following its reaffirmation of the "right to strike," the court pointed to the only two types of strikes which Congress had limited, and which did not affect appellants in that case: (1) strikes for improper objectives under Section 8 (b) (4) of Title I, and (2) strikes which might create a national emergency under Sections 206-210 of Title II. Immediately after such reference to Title II the court stated: "**None** of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages." (Emphasis ours.) Among the cases cited in support of this statement is one which dealt specifically with a Wisconsin public utility—**LaCrosse Telephone Corp. v. Wisconsin Board**, 336 U. S. 18.

In spite of such clear holding, the argument of the state, in effect, is that Titles I and II must be considered as two separate and distinct legislative acts. The fact is that Congress expressly rejected a motion that would have accomplished that result. 93 Cong. Rec. 4264. In successfully opposing the motion, Senator Taft made it clear that all provisions and titles of the Act were interrelated; that Title I was primarily devoted to securing agreement between employers and employees and to protecting the right of employees to make such agreement; that Title II set up mediation and conciliation machinery to encourage and bring about such agreement; that the temporary delays by injunction in "national emergency" disputes was to provide further opportunity for mediation; that the provision for employee votes on accepting the employer's last offer was to ascertain if an agreement could be reached; that all provisions were "intertwined"; and that the entire act was intended to be a complete "legislative program dealing with collective bargaining." 93 Cong. Rec. 4261-4262.

Again, later in the session when the presidential veto was being considered, Senator Taft repeated that the entire Act was based upon the Wagner Act "on the theory that the solution of the labor problem in the United States is

free, collective bargaining;[1] that an employer and all of his employees, acting as one man, "shall be free to make the bargain they wish to make"; that the right to strike after discharge of the temporary injunction "is essential to the maintenance of freedom in the United States"; that compulsory arbitration was rejected because of the policy not to impose upon workers "any conditions to which they, through their representatives, do not agree"; and that "free collective bargaining" had not been modified by the Act in any material way. 93 Cong. Rec. 7536-7537.

This congressional scheme of one integrated, interdependent legislative enactment also appears from Title V of the Act, which incorporates all of the essential definitions of Title I into all other provisions of the Act [Section 501 (3)].

Further evidence that Title II does not, because it deals with national emergencies, impliedly permit the state to handle "local" emergencies affecting interstate commerce is supplied by reference to the provisions of H. R. 3020 (the Hartley Bill) which, together with S. 1126, finally emerged as the Act. Title II of H. R. 3020, as it passed the house, dealt with "Strikes Imperiling Public Health and Safety." Under Section 203 (a), if a labor dispute "has resulted in, or imminently threatens to result in, the cessation or substantial curtailment of interstate or foreign commerce in **transportation, public utility**, or communication services essential to the public health, safety, or interest," the acts creating such situation were to be subject to restraint. The pattern of such proposed restraint is not material here except to note that in the proposed legislation, as in the Act as finally passed, there was no duty to accept any proposal of settlement [Section 204 (d)] and that the injunction was to be discharged after the procedures for conciliation, mediation, and advisory settlement were exhausted [Section 204 (f)].

1 See S. Rep. No. 573, 74th Cong., 1st Sess. (1935).

The provisions of the House Bill thus embraced more than the limited type of dispute with which the provisions of Title II are concerned.

The rejection of the House provisions, including, as they did, specific reference to "public utilities" and "public health, safety or interest," and limiting the application of Sections 206-210 to strikes affecting an "entire industry or a substantial part thereof" which would "imperil the national health" (Section 206), present persuasive evidence that there was no inclination on the part of the Congress to enlarge the area of exception. And while it is true that employees of public utilities, under certain circumstances, will be subject to the provisions of Sections 206-210, they become so subject, not because of their employment by public utilities as such, but because of the effect their strike may have on the national health or safety.

As pertinent as is the Bill which was passed by the House are the Bills which were introduced but rejected. Five identical Bills (H. R. 17, 34, 68, 75, 76) were introduced setting forth the policy of their authors that strikes endangering the public health should be outlawed, some alternative means provided to settle such disputes, and that "state and local governments should have the responsibility and should be permitted by the Federal Government to exercise the responsibility to handle just as many of these situations as it is possible for them to do." These Bills provided that the President could act in emergency situations created by suspension or substantial curtailment of public utility and communication service, among others, if "local government facilities to prevent the work stoppage are not being or cannot be effectively utilized." One of the arguments made in favor of such legislation was that it would give "local and state governments first opportunity to deal with all disputes within their jurisdic-

tion if they can handle them adequately." Extension of Remarks of Rep. Case, 93 Cong. Rec. A-1007.[2] Failure of this type of proposal to secure Congressional approval is eloquent witness to the Congressional policy and purpose.

Any doubt that there may be with respect to the Congressional intent in this matter, regardless of whether Article II is considered alone or in connection with Title I and other provisions of the Act, is completely dissipated by the majority Report of the Senate Committee on Labor and Public Welfare (S. Rep. No. 105, 80th Cong., 1st Sess., p. 13):

> "In dealing with the problem of the direct settlement of labor disputes the committee has considered a great variety of the proposals ranging from compulsory arbitration, the establishment of fact-finding boards, creation of an over-all mediation tribunal, and the imposition of specified waiting periods. In our judgment, while none of these suggestions is completely devoid of merit, the experience of the Federal Government with such devices has been such that we do not feel warranted in recommending that any such plans become permanent legislation."

With specific reference to Title II, the Report states (p. 28):

> "The theory of this section is that it is not desirable in an economy such as ours for the Federal Government to play a partisan role with respect to disputes between management and labor and that compulsory arbitration is not an effective or desirable method to be employed."

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2 No effort is here made to detail all of the legislative proposals for anti-strike and compulsory arbitration legislation in the field of public utilities. An illuminating discussion of proposals of this type made during the ten years preceding the enactment of the Labor Management Relations Act of 1947 and during the 80th Session of the Congress, will be found in Millis and Brown, From the Wagner Act to Taft-Hartley 332-392 (University of Chicago Press, 1950).

Senator Taft, the co-author of the amending Bill, and its manager on the floor of the Senate, when presenting the majority report of the Senate Committee on Labor and Public Welfare further elaborated on the Committee Report as follows (93 Cong. Rec. 3835):

"We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices and working conditions. But if we impose compulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy. * * *

"**It is suggested that we might do so in the case of public utilities; and I suppose that the argument is stronger there, because we fix the rate of public utilities, and we might, I suppose, fix the wages of public utility workers. Yet we have hesitated to embark even on that course,** because if we once begin a process of the Government fixing wages, it must end in more and more wage fixing and finally Government price fixing. It may be a popular thing to do. Today people seem to think that all that is necessary to do is to forbid strikes, fix wages and compel men to continue working, without consideration of the human and constitutional problems involved in that process.

"If we begin with public utilities it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the Bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours and working conditions after proper opportunity for mediation."

Thus, the sponsors and authors of the amended Act felt that basic to the purposes to be accomplished by the Act was the protection of the right to strike in aid of collective bargaining and other mutual aid and assistance, even though the exercise of such right in some circumstances may involve inconvenience and hardship to the public.

The only limitations imposed upon such right to strike by the Congress were:

1. The requirement of a sixty (60) day notice when a contract was in effect [Section 8 (d)].

2. Prohibition of certain types of strikes which were for the purpose of accomplishing objectives which were considered to be against public policy [Section 8 (b) (4)]; which type of strikes were subject to injunctive process [Section 10 (j), (l)], and the basis for civil action for damage (Section 303).

3. Temporary delay of strikes which the President of the United States believes may imperil the national health or safety (Sections 206-210).

In view of these specific exclusions from the general policy of the law, which exclusions appear in both Titles I and II, and in light of the legislative history with respect to attempts to prohibit strikes and to require compulsory arbitration in public utilities, it is clear that Title II cannot be read as yielding to the states any part of the field which was occupied by Congress in the enactment of the Labor Management Relations Act, 1947. Title II represents a very limited exception to the basic policies and principles set forth in Title I; an exception which comes into being under a narrowly-circumscribed set of circumstances and for a limited period of time, but which nevertheless recognizes, in the terminal point of its procedures, the basic right to strike in aid of collective bargaining.[3]

[3] In Sections 206-210 Congress placed its faith on the force of public opinion. S. Rep. No. 105, 80th Cong., 1st Sess., p. 15.

Where Congress thought the state could consistently cooperate with the federal Government in the mediation and conciliation process, it made express provisions for doing so [Sections 8 (d), 202 (c), 203 (b)]. Had it intended that the states could, in addition to assisting in that process, devise its own method of settlement of disputes, different from that thought best by Congress, it would have done so, just as it had with respect to other important policy provisions [Section 14 (b)].

It cannot be validly argued, as does the state, that the Senate Report and congressional statements are limited to federal policy, and therefore cannot be construed as intending or evidencing any intention that the states shall be bound by such policy. For if this argument were valid then all previous decisions of this court on the question go for naught, and we have left only the "patch work" referred to in **National Labor Relations Board v. Hearst Publications, Inc.**, 322 U. S. 111, 123, and the obstacles "to the accomplishment and execution of the full purposes and objectives of Congress", which this court refused to permit in **Bethlehem Steel Co. v. New York State Labor Relations Board**, 330 U. S. 767, 773, and **Hill v. Florida**, 325 U. S. 538, 542. The **O'Brien** case, supra, would become a mere exercise in rhetoric. If the states can carve out of the federal field in which Congress has legislated all privately-owned public utilities, something which the federal Congress, the National Board and this court have never before permitted, for policy reasons deemed sufficient to them, then Michigan can do so with its vital automobile industry, Texas with its oil, and Pennsylvania with its steel and mines, as can all other states having a dominant industry in which a strike will have a far-reaching effect on local health, safety and morals.

It is submitted that there is no merit to the suggestion that Title II must be considered independently of Title I, or that Title II, any more than any other provision of the

Act, permits of state intrusion into the field found in the **O'Brien** case, supra, to be so completely occupied by Congress.

2. **A privately-owned public utility employer does not have any preferred or different status under the federal law than does any employer engaged in ordinary commercial or industrial enterprises.**

It is also urged that public utilities are agents of the state, performing functions which the state would otherwise be required to perform if not undertaken by privately-owned corporations. From this premise, it is then argued that "the decision in this case should be made on the basis of the same legal principles as would apply if all the public utilities of Wisconsin were owned and operated by the state." (Respondent employer's Brief in Opposition, Case No. 330, p. 7.) The Wisconsin Supreme Court takes a less extreme position[4] in the more recent case of **Wisconsin Employment Relations Board v. Milwaukee Gas Light Co. et al.** (now pending here as Case No. 438, October Term, 1950), resting its position on the theory that the greater right of control over public utilities by the state should give it immunity from the superior federal power.

This argument not only overlooks the legislative history and congressional record referred to above, but also ignores the fact that while states and their political subdivisions were expressly excluded from the definition of "employer" in the federal Act [Section 2 (2)], privately-owned public utilities were not. It also ignores the fact that in Title V the definition of "employer", and all other pertinent definitions contained in Title I, are incorporated into Title II of the Act [Section 501 (3)]. Thus, by definition, there is no exception in the Act which would give

[4] It could hardly do otherwise since the Wisconsin Act in question here defines a "public utility employer" as "any employer (other than the state or any political subdivision thereof) * * *." Section 111.51 (1).

to privately-owned public utilities any preferred status under the Act.

Additionally, privately-owned public utilities have never been treated by the National Labor Relations Board, the lower federal courts, nor this Court as other than private employers covered by the federal Act.

In one of the early cases involving the applicability of the federal Act to a local public utility, the public utility urged that state legislation, including legislation relating to the operation of public utility companies, prevented the exercise of jurisdiction by the National Labor Relations Board. This argument was rejected. **Consolidated Edison Co., etc., et al., v. National Labor Relations Board,** 305 U. S. 197, 222-223.[5]

In a number of subsequent cases the Court dealt with disputes involving public utility employers but drew no distinction between such employers and others insofar as the provisions of the federal Act were concerned. **National Labor Relations Board v. Virginia Electric and Power Co.,** 314 U. S. 469; **National Labor Relations Board v. Indiana and Michigan Electric Co.,** 318 U. S. 9; **National Labor Relations Board v. Southern Bell Telephone and Telegraph Co.,** 319 U. S. 50; **La Crosse Telephone Corp. v. Wisconsin Employment Relations Board,** 336 U. S. 18 (also cited in support of the basic holding in the **O'Brien** case, supra).

Similarly, the National Labor Relations Board never considered that the federal Act, either before or after its amendment, permitted of any distinction between private industries and privately-owned public utilities. Particularly with respect to the right to strike it early held that

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5 It appears from the opinion of the Circuit Court of Appeals that the utility argued, as is done here, that consideration of the health, safety and convenience of the residents of the City of New York outweighed the national interest in protecting interstate commerce from disruption, and that extension of the federal jurisdiction to local public utilities would obliterate our dual system of government. The argument was rejected. Consolidated Edison Co. v. National Labor Relations Board, 95 F. 2d 390, 394 (C. A. 2, 1938).

"Neither in that Section (Section 13) nor any other does the Act distinguish between public utility employees and those otherwise employed. Hence, there is no valid basis for the contention that the nature of the employment of these employees justified their discharge because they struck." **In the Matter of El Paso Electric Company,** 13 N. L. R. B. 213, 240, enforced, 119 F. 2d 581 (C. A. 5, 1941).

Under the present Labor Management Relations Act the National Board rejected the argument that the Public Utility Labor Law of Missouri constituted a bar to its jurisdiction. **In the Matter of Middle States Utilities Company,** 81 N. L. R. B. 416, 417, n. 1 (1949). See also **In the Matter of Laclede Gas Light Company,** 80 N. L. R. B. 839, 842 (1948).

It is submitted the argument has neither relevance nor merit.

3. **None of the other recent decisions of this court sustains the state's position.**

The state also argues that despite the **O'Brien** case, supra, the holding of this court in the case of **International Union, United Automobile Workers, A. F. of L., v. Wisconsin Employment Relations Board,** 336 U. S. 245 (hereinafter referred to as the **Auto Workers** case) permits of the type of prohibition here involved. But the **O'Brien** case makes it clear that the **Auto Workers** case "was not concerned with a traditional, peaceful strike for higher wages," but with activities that were similar to the "sit-down strike" and "labor violence." 339 U. S. at p. 459. The **Auto Workers** case, therefore, does not stand for the proposition that the state may define as unlawful those activities which are otherwise lawful under the federal Act. It held only that if the activities are not protected activities under the federal Act, the state is free to act. The activities here involved are lawful under the federal Act, and arose under circumstances indistinguishable from

those in the **O'Brien** case, excepting only the type of industry involved.

In relying on this court's decision in the **Auto Workers** case, supra, and disregarding the flat holding of this court in the **O'Brien** case, supra, the state paid no attention to the statement of the majority in the **Auto Workers** case that:

> "No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert." 336 U. S. at p. 258.

Section 111.62 of the Wisconsin Statutes does expressly make concerted activities, otherwise lawful, a criminal conspiracy subject to restraint and punishable as such. It is the concert of activities that Section 111.62 is directed against, as contrasted with individual activities which are permissible under Section 111.64, even if exercised on a mass, though individually-conceived, basis and having like results.

Nor are the cases of **Giboney v. Empire Storage and Ice Co.**, 336 U. S. 490; **Building Service Employees v. Gazzam**, 339 U. S. 532, and **International Brotherhood, etc., v. Hanke**, 339 U. S. 470, applicable here. None of such cases involved the question of peaceful strikes for higher wages or questions of conflict with the federal Act.

B

The Wisconsin Law Is in Direct Conflict With the Federal Law

Petitioners submit that under the **O'Brien** case, supra, no power remains in the state to prohibit peaceful strikes for lawful purposes, regardless of what industry may be involved, if interstate commerce is affected. We believe that the court's statement in the **O'Brien** case that "even if

some state legislation in this area could be sustained, the particular statute before us could not stand," does not at all qualify its earlier statement in the same case relating to complete congressional occupation of the field, but was intended to emphasize the soundness of the earlier principle enunciated. It is conceivable that the court may have had in mind, when it made the later statement, strikes for purposes other than those referred to, but, in its context, it could not have intended to distinguish between the types of industries involved or to indicate that the answer would be different, depending upon the **effect** of a strike as distinguished from its **methods** or **purposes.**

However, if it were to be held that there was no such complete congressional occupation of the field so as to exclude the state from acting in the field of public utility disputes, it is submitted that whatever action the state does take in dealing with "emergency" situations must "move freely within the orbit" of the purpose of the federal law dealing with the same subject, without the laws "infringing upon one another." **Hill v. Florida,** 325 U. S. 538, 543. The Wisconsin law cannot meet this test, either with respect to its policy or with respect to its specific provisions.

1. There is basic conflict in policy and in method of treatment in the special field.

Wisconsin's absolute prohibition on the right to strike in support of collective bargaining does violence to the entire concept of the collective bargaining process protected by the federal Act which, realistically, is the process by which employees through self-organization, although under considerable economic compulsion to continue to work, are able to deal on terms approaching equality with the employer for the aggregate of the employees' services because of the employees' legal right and actual ability to quit work in concert. Labor Management Relations Act, Sections 7 and 13; **American Steel Foundries v. Tri-City Central Trades Council,** 257 U. S. 184, 209; **Texas and New**

Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks, 281 U. S. 548, 570; **National Labor Relations Board v. Mackay Radio and Telegraph Co.**, 304 U. S. 333, 345, 347; **National Labor Relations Board v. Fansteel Metallurgical Corp.**, 306 U. S. 240, 256.

Obviously, if the employees are not legally free to quit in concert, or to agree among themselves upon minimum conditions which they will accept for continued service, or to advocate concerted quitting in a union meeting, or to notify the employer of their decision, such employees are not in a position to bargain for their aggregate services.

One cannot bargain for that which he does not have the legal power to withhold.[6]

Under the Wisconsin law the strike is not permitted to perform any function whatsoever as an aid to collective bargaining. The law makes the mere threat, call, or vote to strike a misdemeanor. Thus, the strike cannot "make effective the collective bargaining power which Section 7 of the Wagner Act guarantees", Douglas, J., dissenting in

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[6] In Labor and National Defense (Twentieth Century Fund, 1941), at page 70, it is pointed out that:

> "The right to quit work in a body is labor's main bargaining weapon. Rarely used by a strong trade union, it is an implicit economic sanction, always in the background of collective bargaining."

George W. Taylor, Professor of Industry, Wharton School of Finance and Commerce, University of Pennsylvania, and former Chairman of the National War Labor Board, in his "Government Regulation of Industrial Relations" (Prentice-Hall Inc., 1948), observes at pages 21-22:

> "As an inducer of peaceful settlements, the right to strike is most effective when the parties know that a work stoppage, actually called, will continue until an agreement is reached. The greater the risk, the more reason for compromise and agreement. If the known policy of the government is to intervene promptly in order to prevent any protracted stoppage of production, as during the war and shortly thereafter, the risks of a shut-down are minimized and the reasons for compromise and agreement around the conference table can quickly disappear.
>
> "A right to engage in industrial warfare is essential to the cause of industrial peace under the collective bargaining system. Such a notion is perplexing and anomalous. It is, nevertheless, a very practical principle in a world where the golden rule is still far from accepted as a universal guide for conduct. Many a labor agreement is not signed until 'one minute before twelve,' after last-ditch positions have been taken by both sides with an eye to what it is worth in 'concessions' to avoid a shut-down."

International Union, United Automobile Workers, A. F. of L., v. Wisconsin Employment Relations Board, 336 U. S. 245, 266.

Congressional reliance on the principles of free collective bargaining in handling emergency situations, with no absolute limitation on the right to strike, appears as conclusively from analysis of Title II, as it does from the legislative history and debates.

Section 201 (a) affirms the policy of the United States that "sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees."

This emphasis on voluntary settlements is repeated and re-emphasized in Section 201 (b) which establishes the policy of encouraging the settlement of issues "between employers and employees through collective bargaining * * * by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration" as aids and encouragements to the parties "to reach and maintain agreements" and to settle their differences by "mutual agreement through conferences and collective bargaining."

Section 202 (c) authorizes the Director of the Service to establish "suitable procedures for cooperation with state and local mediation agencies."

Section 203 (a) imposes the duty on the Service to assist the parties to settle their disputes through "conciliation and mediation"; Section 203 (b) provides for state **mediation** and **conciliation,** if available, in disputes having only a "minor" effect on interstate commerce, and again enjoins the Service to use its best efforts to bring

about "agreement". Section 203 (c) directs the Service, if it fails to settle the dispute, to induce the parties "voluntarily to seek other means of settling the dispute * * *", but the failure or refusal of any party to agree to any procedure suggested "shall not be deemed a violation of any duty imposed by this Act." Section 203 (d) repeats the federal policy of voluntarism in stating that "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." [This is to be compared with the Wisconsin law which applies to disputes over the interpretation of a contract, as well as to disputes over the terms of a new contract. Section 111.57 (2).]

Section 204 sets forth the policy that employers and employees and their representatives shall exert every reasonable effort to make and maintain agreements, expeditiously settle disputes arising under contracts, and participate fully and promptly in meetings which might be undertaken to aid in settlement of such disputes.

By Section 205 there is created an advisory panel to advise with respect to "mediation and voluntary adjustment" of controversies.

Thus Title II, no less than Title I, rejects, as federal policy, the elements of compulsion or governmental dictation in the settlement of disputes. It is based upon free collective bargaining, and, as in Sections 8 (d) (3) and 14 (b) of Title I, where state participation is contemplated in furtherance of this policy, such participation is specifically referred to [Sections 202 (c) and 203 (b)].

Consistent with this emphasis on voluntarism, and collective bargaining as the federal policy in the settlement of disputes, Sections 206-210 represent the considered policy of Congress to provide for the temporary delay or re-

straint of strikes in national emergency situations, and in such situations only, so as to permit full use and exploration of all voluntary methods of agreement with the aid of governmental agencies.

The situation in which Sections 206-210 become applicable is narrowly limited to strikes "affecting an entire industry or a substantial part thereof" which "will, if permitted to occur or to continue, imperil the national health or safety." Under such circumstance, the President may set into motion procedures which, in their early stages, lead to the issuance of an injunction (Section 208).

During the period the injunction is in effect, the emphasis is again placed on voluntary settlement, Section 209 (a) requiring the parties to make every effort to "adjust and settle their differences" but further providing that "neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service."

Failing voluntary settlement during a period of 80 days the injunction against strikes is discharged and the strike is permitted to run its course (Section 210).

This treatment of strikes in a situation of carefully-defined emergency is to be contrasted with the absolute prohibition imposed by Wisconsin in blanket fashion over an entire segment of industry without regard to the nature of the emergency, if any. The basic inconsistency is irreconcilable.

2. The Wisconsin law actually interferes with and impedes the part which Congress intended for the federal mediation process.

Comparison of the provisions of the federal Act dealing with the role to be played by mediation and concilia-

tion, and the time table of its application, shows further inconsistency in the Wisconsin law.

Under the federal Act the period of mediation may start sixty days before the contemplated strike or lockout action, and the Federal Mediation and Conciliation Service must be notified no less than thirty days before such time [Section 8 (d) (3)].

A strike may be called and may actually take place after compliance with the provisions of Section 8 (d), since whether an injunction will be issued under Section 208 is dependent upon the circumstances. The injunctive process is not necessarily invoked prior to the strike but may be invoked after the commencement of the strike (Sections 206, 208, 210). If an injunction is issued, intensive governmental efforts to obtain a voluntary agreement are continued for a minimum period of eighty days [Section 209 (b)], after which the strike may start or continue (Section 210), and thus perform its function as an aid to collective bargaining.

In sharp contrast, the Wisconsin law does not permit the threat of an actual strike at any time (Section 111.62). The period for mediation or conciliation is limited to fifteen days, after which an arbitration board is convened to hear and determine the dispute (Section 111.55).

That Wisconsin's reliance on compulsion, as contrasted with federal reliance on mediation and conciliation, impedes and interferes with the federal policy appears from the actual experience of the Federal Mediation and Conciliation Service. The Director of the Service, in his first annual report, stated that "State legislation providing for special mediation, arbitration or fact-finding machinery has placed a practical limitation and restriction on any action by the Service." He pointed out that under the broad congressional language "the Service would undoubtedly be justified in regarding it as its duty to me-

diate in many cases in which State utility statutes have prescribed a procedure for the settlement of disputes not consistent with that prescribed by Congress," but for practical reasons, it "has refrained from taking the leading role in the mediation of such disputes" because of such conflict. First Annual Report, Federal Mediation and Conciliation Service, page 39 (Gov't Printing Office, 1949).

3. **Insofar as both laws attempt to deal with the effects of strikes within certain industries, different and inconsistent tests are applied.**

The Wisconsin law on its face and as applied here does not purport to deal with "emergency" situations; it deals with "interruptions of an essential service" regardless of whether such "interruption" creates an emergency or not. What is an "essential" service is defined by statute [Section 111.51 (2)]; what is an interruption is to be determined, ex parte, by the **Wisconsin Employment Relations Board** (Section 111.54); **Wisconsin Telephone Company v. Wisconsin Employment Relations Board,** 253 Wis. 584, 34 N. W. 2d 844 (1948). No place in the statute is any effort made to weigh the effect of the "interruption" of the "essential service" on the people of the state. On the other hand, whether there shall be any temporary delay of a strike, actual or threatened, under Title II is dependent upon whether it will "imperil the national health or safety," a fact to be determined, in each case as it arises, both administratively (Section 206) and judicially (Section 208).

Thus, while both statutes purport to deal with "effects" of certain types of strikes, rather than methods or purposes, the federal statute is carefully limited in its application to effects which are definitely described, and on a case-to-case basis, while the Wisconsin law **assumes** an effect from the nature of the industry involved, invoking

such assumption without regard to the facts of the particular case.

4. There is a real possibility of over-lapping jurisdiction in the application of the two laws.

Among the many "potentials of conflict" (**LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board,** 336 U. S. 18, 26) is the probability that Sections 206-210 of the federal Act and the provisions of the state law may be applied to the same situation. Should that circumstance arise there would be direct collision between the state and federal method of handling the dispute.

The roles which Congress has assigned to the President of the United States, the presidential board of inquiry, the Attorney-General, the National Labor Relations Board and the federal courts would be crowded onto the same stage with the state-assigned roles of the Wisconsin Employment Relations Board, state conciliator, board of arbitration and state courts. From what law then do the players, including the employer and its employees, take their cue?

In addition to this confusion as to who is to proceed and when, another and real source of potential conflict would arise in the event a strike is threatened or should take place in violation of state law, since no small part of the duties of the National Labor Relations Board relates to the problem of applying the provisions of the National Act in strike situations and their aftermath.

Thus, where a strike results from, or is prolonged by, commission of unfair labor practices by an employer, employees are entitled to reinstatement to their original jobs or similar jobs, regardless of whether or not such jobs have been filled during the strike by others; and the employer may be directed to reimburse such employees for wages lost from the time of their unconditional offer to return to work until such time as they are actually

reinstated. **National Labor Relations Board v. Phelps Dodge Corp.**, 313 U. S. 177; if the strike results from an impasse or stalemate in collective bargaining, the striking employees are not entitled to reinstatement if their jobs have been filled, but they may not be discriminated against with respect to whatever employment opportunities may be open then or later. **National Labor Relations Board v. Mackay Radio and Telegraph Co.**, 304 U. S. 333.

The strikers may be without any remedy with respect to reinstatement or back pay if the strike was in violation of contract (**National Labor Relations Board v. Sands Manufacturing Co.**, 306 U. S. 332); contrary to some other federal law of equal importance (**National Labor Relations Board v. Southern Steamship Co.**, 316 U. S. 31); or accompanied by acts which are clearly unlawful (**National Labor Relations Board v. Fansteel Metallurgical Corp.**, 306 U. S. 240).

If the strike was called in violation of Section 8 (d) of the federal Act, the employment relationship is severed; if in violation of Section 8 (b) the Board is vested with the discretion to seek a federal court injunction [Section 10 (j)], and in some types of strikes it is required to petition for such injunction [Section 10 (k)]. With respect to these provisions of the Act relating to enforcement of the Act by injunction, it is important to observe that it is the National Board which is given such right and no other person or agency. [**Amazon Cotton Mill Co. v. Textile Workers Union**, 167 F. 2d 183 (C. A. 4); **Amalgamated Association, etc., v. Dixie Motor Coach Co.**, 170 F. 2d 902 (C. A. 8)].

Under Section 2 (2) of the federal Act, employees out on strike retain their status as employees. **National Labor Relations Board v. Mackay Radio and Telegraph Co.**, supra. This important provision was placed in the federal Act to make sure that employees would continue to have the protection of the Act while engaging in the con-

certed activities protected by the Act. For, if this were not done, the result would be "to withdraw the Government from the field at the very point where the process of collective bargaining had reached a critical stage and where the general public interest had mounted to its highest point." S. Rep. No. 573, 74th Cong., 1st Sess., p. 6.

Strikes for recognition as collective bargaining agent are valid under the federal Act. **In the Matter of Perry Norvell Co.**, 80 N. L. R. B. 225.

The decisions of this court, cited above, all recognize that in these types of situations the duty is placed upon the National Labor Relations Board in the first instance to determine the nature of circumstances which led to the strike, and the rights and duties of the employees and employers under such circumstances, subject to subsequent review in the federal courts.

In the performance of these various functions, the Board is under no obligation to follow state law. **National Labor Relations Board v. Kalamazoo Stationery Co.**, 160 F. 2d 465, cert. den., 332 U. S. 762. Only in those instances where the Board expressly cedes jurisdiction to states having legislation consistent with the federal legislation may the states be empowered to exercise these vital functions [Section 10 (a)].

By contrast and in direct conflict with the varied method of treatment under the federal Act which is entrusted to the National Labor Relations Board, many of the questions which arise in strike situations are pre-determined by the Wisconsin law: participants in the calling of a strike or in the actual strike are guilty of a misdemeanor (Section 111.62); their activities are subject to restraint (Section 111.63); and they may lose their status as employees [Section 111.06 (2) (j), 111.02 (3)].

In the instant case, the strike may have resulted from the commission of unfair labor practices, as claimed by

the petitioners in the charge now pending before the National Labor Relations Board (R. 144), or from an impasse or stalemate in collective bargaining, as was found by the State Board in applying the provisions of the state law (R. 130). Yet, under the state law, all of the questions which may arise with respect to the rights and privileges of the employees had been pre-determined. If the law is upheld, then the many important duties and functions vested in the National Labor Relations Board by the Congress are, to the extent of inconsistency with the state law, completely obliterated. The congressional purposes and policies, as well as the specific duties and functions of the National Board, are thus repealed by state action.

A case-by-case test would be so obviously productive of mischief that it must be rejected. **Bethlehem Steel Co. v. New York State Labor Relations Board**, 330 U. S. 767, 776; **La Crosse Telephone Corp. v. Wisconsin Employment Relations Board**, supra.

C

An Adverse Decision Will Not Unduly Prejudice the State

Much of the argument against assertion of the superior federal power here is based more upon emotion than upon law. It is urged that rejection of the particular type of state legislation here involved would destroy our dual system of government and leave the states helpless against possible disaster. This is an argument that has been made many times to this court, and rejected by it, without any apparent catastrophic effects or weakening of the Federal Union. It is an argument for which there are many obvious answers, when considered in the light of the facts of the present case:

1. The Wisconsin law does not purport to deal with "disaster" or "catastrophe" situations. It is general,

comprehensive, and automatic in its application. There is not the slightest suggestion in the instant case that a situation imminently dangerous to the community would have arisen if the strike were permitted to proceed.[7]

2. If a strike, or threatened strike of local transit employees, or of employees of other public utility corporations, were to create a critical situation, the application of the provisions of Sections 206-210 of the federal Act would undoubtedly follow. It is reasonably certain that, if in a large metropolitan and industrial community such as Milwaukee,[8] a strike in a public utility would seriously affect the normal commercial and industrial life of the area, such situation would have such national repercussions that the tests of the federal Act would be met. It is not likely that federal intervention will be withheld merely because the immediate incidence of the dispute falls most heavily on a particular local area.[9] In our highly integrated and

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7 In 1948 there were 187,919 private passenger automobiles registered in Milwaukee County; in 1949 this figure increased to 212,580. **Motor Vehicle Registration List, Wisconsin Motor Vehicle Department (1948, 1949).**

8 The population of the City of Milwaukee as of April 1, 1950, was 632,651; that of Milwaukee County, 863,937. **Bureau of the Census, Department of Commerce, Preliminary Counts, Series PC-2, No. 38 (1950).**
In terms of value added by manufacture, metropolitan Milwaukee accounts for a substantial percentage of this country's total in various fields: engines and turbines, 11.4%; construction and mining machinery, 7.9%; general industrial machinery, 3.2%; metalworking machinery, 2.7%; electrical machinery, 2.7%; special industrial machinery, 2%; leather and leather products, 3%. Census of Manufacturers (1947), United States Department of Commerce, Vol. I, General Summary, Table 2, and Vol. III (Wisconsin), Table 5 (1947).
Milwaukee is considered generally as the leader, or among the leaders, in the production of automobile frames; heavy lubricating equipment; steam shovels; dredges; cement machinery; hydraulic units; water pumping, ice-making and refrigeration machinery; diesel and gas engines; automobile electrical controls; tinware and enamelware; and cranes and hoists. Bruce, Short History of Milwaukee (Bruce Publishing Co., Milwaukee, 1936); Facts About Milwaukee, 1941-1942 (Milwaukee Sentinel).

9 Under the general powers of the President, sixteen Fact-Finding Boards were appointed between 1945 and 1950. Among the disputes handled in this manner were two local utility disputes, including one at the Milwaukee Gas Light Company; five involved single employers. Under the terms of Title II of the Labor Management Relations Act, 1947, eight Boards of Inquiry have been appointed, two of which involved single employers. Federal Fact-Finding Boards and Boards of Inquiry, United States Department of Labor, Bureau of Labor Statistics (1950).

complicated economy, any serious economic disruption or danger to health and morals in a local area could very well rise to the rank of national emergency. The broad jurisdiction assumed by the federal Congress, and sustained by this court, not only in the labor-management field but in other fields, is demonstrative of this. Stern, The Commerce Clause and The National Economy, 59 Harv. L. Rev. 645 and 683 (1946). If, on the other hand, the community affected were a small one, with little commercial or industrial activities, it is more than likely that the employment relationship involved will be one which does not come within the scope of the federal Act in any of its aspects.

3. Strikes in public utilities occur rarely.[10] In the entire state of Wisconsin there were no more than ten in the last half century. **Polner, Some Aspects of the Recent State Legislation to Prohibit Strikes in Public Utilities,** 45 et seq. (Unpublished study, Department of Economics, University of Wisconsin, 1948). The experience in other states apparently is very much the same since the preponderant majority of the states have not found it necessary to enact such legislation.[11] If anything, the Wisconsin type of legislation encourages rather than prevents crucial disputes.

4. Rejection of a particular state legislative scheme so transparently in conflict with national policy does not necessarily preclude the states from taking effective action in those rare situations where the national emergency provisions of the federal law might not be applicable. Since neither the state nor its political subdivisions are con-

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10 "The labor record of utility workers in Wisconsin is so nearly perfect that any attempt to outlaw strikes is making a mountain out of a molehill." F. Larkin, Vice President, Wisconsin Electric Power Company, quoted in the Milwaukee Journal, April 3, 1947.

11 Only eleven states have passed some type of legislation dealing with the subject, there being great variation in the pattern of control. See Roberts, Compulsory Arbitration of Labor Disputes in Public Utilities, 1 Labor Law Journal 694 (CCH, 1950).

sidered "employers" under the federal law, seizure by the state, in a situation justifying such action, might very promptly result in ouster of federal jurisdiction. See **United States v. United Mine Workers**, 330 U. S. 258.

5. Finally, the state's argument should be made, as it already has been made, to the only forum which may properly consider it—the federal Congress. It is for Congress to weigh this type of argument against what it considers the national interest in matters that are within its competence. To this date, at least, Congress remains convinced that the balance favored the policy and technique expressed in the Labor Management Relations Act, 1947.[12] The legislative history of the Act, congressional debates, and its express provisions, including the grant of right to the states to impose greater restrictions on union security contracts [14 (b)], demonstrate that Congress was completely aware of the states' local problems and further demonstrate that, where Congress felt that greater latitude should be granted to the states, it did so, directly and expressly.

II

THE WISCONSIN LAW IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

From the statement of facts, the literal language of the statute, and the judgment and the decision of the Wisconsin Supreme Court, it is apparent that the Wisconsin law, as construed by the Wisconsin Supreme Court, imposes a previous restraint, absolute in character and unlimited in

12 American and foreign experience amply support the wisdom of the congressional choice. Gagliardo, The Kansas Industrial Court (University of Kansas Press, 1941); Ross, The Constitutional History of Industrial Arbitration in Australia, 30 Minn. L. passim (1945); Williams, Settlement of Industrial Disputes in Seven Foreign Countries, 63 Monthly Labor Review 224 (1940); Taylor, Government Regulation of Industrial Relations (Prentice-Hall, Inc., 1948); The Twentieth Century Fund, Labor and National Defense, 99 et seq. (1941).

duration, upon the exercise by employees of "concerted activities" for the purpose of collective bargaining. For example: A vote by union members upon a minimum standard of wages and working conditions for which they will not work is in effect an "agreement" to strike, which would encourage employees to quit in concert if such minimum standards were not met. The advocacy at a union meeting (as here) of the adoption of a resolution to strike would be an inducement or encouragement to strike. And, of course, the actual concerted quitting is made a violation. All these acts are punishable as misdemeanors by the Wisconsin Statute.

The Wisconsin law makes the strike in itself an unlawful act. It thus applies, in substance, the conspiracy doctrine to the strike; it makes unlawful the agreement, or advocacy of action when done by two or more in concert, although the action would be lawful if done by any one of them alone.

This legislative abrogation of the right to strike is absolute, without regard to the reasons for, or the ends sought by, the concerted activity, and without regard for the fact that in every other respect the strike is accompanied by perfect obedience to law.

The statute and judgment thus embrace previous restraints on fundamental human liberties which include, but are not limited to, the rights of free speech, public assemblage, freedom of contract, and freedom to dispose of one's labor. **Allgeyer v. Louisiana**, 165 U. S. 578; **Truax v. Raich**, 239 U. S. 33; **Wolff Packing Co. v. Court of Industrial Relations**, 262 U. S. 522; **Stapleton v. Mitchell**, 60 F. Supp. 51 (D. Kans. 1945); **Alabama State Federation of Labor v. McAdory**, 18 So. 2d 810 (Ala. 1944); **Hotel & Restaurant Employees v. Greenwood**, 30 So. 2d 696 (Ala. 1947). See **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184; **Near v. Minnesota**, 283 U. S. 697; **National Labor Relations Board v.**

Jones & Laughlin Steel Corp., 301 U. S. 1, 33; **National Labor Relations Board v. Fansteel Metallurgical Corp.**, 306 U. S. 240, 256; **Hague v. Committee for Industrial Organization**, 307 U. S. 496; **Thornhill v. Alabama**, 310 U. S. 88; **Carlson v. California**, 310 U. S. 106, 112; **Thomas v. Collins**, 323 U. S. 516.

In support of the argument that the statute and injunction do **not** deprive of rights under the Fourteenth Amendment to the Constitution of the United States, reliance is placed principally on the cases of **Dorchy v. Kansas**, 272 U. S. 306, and **Wilson v. New**, 243 U. S. 332.

The question in the Dorchy case, supra, was "not, however, the broad one whether the legislature has power to prohibit strikes," but rather the narrow one whether the state statute was "unconstitutional as here applied" (p. 309). As there applied, the statute made criminal a strike "to collect a stale claim," a purpose likened to "extortion" (p. 311). It was under such circumstances that the statement was made that "Neither the common law nor the 14th Amendment, confers the absolute right to strike" (p. 311). The necessary inference is that while the Fourteenth Amendment does not protect the right to strike in all circumstances, it does protect the right to strike in some.

Viewed in proper context, then, all that the court said in the **Dorchy** case, supra, was that the Fourteenth Amendment does not protect strikes where either the means or objective are unlawful.

By contrast, in the instant case the state restrained a call to strike and the strike itself, absent any evidence of impropriety in the method of calling the strike and present only the lawful purpose of improving wages, hours and conditions of employment. This was done as part of a statutory scheme designed to prevent all strikes in certain enumerated types of businesses and to compel the set-

tlement of disputes by arbitration under the control and direction of the state.

The validity of such statute and injunction must therefore be considered, as was done in the cases of **Wolff Packing Co. v. Court of Industrial Relations**, 262 U. S. 522 (1923), and **Wolff Packing Co. v. Court of Industrial Relations**, 267 U. S. 552 (1925), in connection with the other provisions of the statute relating to compulsory arbitration. The decision in both those cases was that the legislative scheme could not stand, as applied to both employers and employees, because in violation of the Due Process Clause of the Fourteenth Amendment.

Those cases require the same holding here, since as in the first **Wolff** case, supra, "while the worker is not required to work at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them, and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him." 262 U. S., at 540. And here, too, workers are deprived "of a most important element of their freedom of labor." 262 U. S., at p. 542.

Respondent seeks to distinguish the holdings of the **Wolff** cases on the basis of the type of industry involved, and cites as more directly applicable to the instant case, the decision in the case of **Wilson v. New**, 243 U. S. 332 (1917). But in the last cited case the federal Congress, confronted with an impending nation-wide crisis, to be precipitated by a strike of all operating employees of virtually all of the railroads of the country, enacted legislation designed to avert such disaster. In so doing, it neither prohibited the threatened strike of the employees nor required arbitration of the dispute. It established a standard eight-hour day as a daily work standard, and directed, for a temporary period, the maintenance of the then existing wages without change because of such reduction in

hours. The right of the Congress so to do under the circumstances then existing was affirmed by this court.

Just six years later, this court stated that its ruling in **Wilson v. New**, supra, "went to the borderline, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster," and it found no justification for "extending the drastic regulation sustained in that exceptional case to the one before us." **Wolff Packing Co. v. Court of Industrial Relations**, 262 U. S. 522, 544 (1923).

As further reason for rejecting the argument that the Kansas legislation was similar to the legislation enacted in **Wilson v. New**, supra, the court said that whether, as claimed by the state, a strike in one packing plant might eventually involve all similar establishments and so produce a food shortage "has not been determined by the legislature but is determined under the law by a subordinate agency, and on its findings and prophecy, owners and employers are to be deprived of freedom of contract and workers of a most important element of their freedom of labor." 262 U. S., at p. 542. (As we shall soon show, under the Wisconsin Law the subordinate agency does not make any determination of the possible consequences of the threatened strike but is limited by the law to making a finding of whether there will be an "interruption" of an "essential" service.)

It is also suggested by respondent, relying on a statement of this court in **Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.**, 335 U. S. 525, 536, that the **Wolff** cases, supra, have since been overruled by subsequent decisions of this court in cases like **Nebbia v. New York**, 291 U. S. 502; **West Coast Hotel Co. v. Parrish**, 300 U. S. 379; **United States v. Darby**, 312 U. S. 100, and **Olsen v. Nebraska**, 313 U. S. 236. In those cases, however, the court only affirmed the legislative right to regulate businesses upon a proper finding that such legislation was

in the public interest; or to establish a minimum level of wages (as contrasted with a fixed wage) legislatively found necessary to protect against evils inherent in the payment of wages below such level. In none of such cases was there conjoined, as here and in the **Wolff** cases, the right to establish **fixed** wages, hours and working conditions of **specific** employees of a **specific** employer, with a restraint on concerted leaving of employment in protest over such governmental directive, absent an emergency of impelling nature.

It is clear that the inability of the Wisconsin law to surmount the obstacle of the Fourteenth Amendment (combining, as it does, anti-strike and compulsory arbitration principles) lies principally in its catch-all definitions of "public utility employer," and "essential service," and in its automatic application of law on occurrence of any "interruption"—a situation far different than that in the case of **Wilson v. New**, supra, but similar in all respects to the situation in the **Wolff Packing Co.** cases, supra.

Since the Wisconsin law is not carefully confined to situations of actual public danger and peril, but embraces all interruptions of essential services, to sustain such legislation would be to completely nullify the "clear and present danger" test heretofore held to be necessary in balancing the protection "of the great, the indispensable democratic freedoms" afforded by the Fourteenth Amendment against the "dubious intrusions" of the police power of the states. **Thomas v. Collins**, 323 U. S. 516, 530. See **De Jonge v. Oregon**, 299 U. S. 353, 364; **Schneider v. New Jersey**, 308 U. S. 147, 161; **Thornhill v. Alabama**, 310 U. S. 88, 105; **Bridges v. California**, 314 U. S. 252, 263. For, as was stated in the **Thomas** case, supra: "* * * any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." 323 U. S., at p. 530.

In the instant case, the state made no showing of clear and present danger, of impending civil disaster, or of conditions imperiling the health, safety or morals of the community. The complaint alleged only that there was a threatened interruption of an essential service (Amended Complaint, Paragraphs 7 and 8, R. 122); that was the only finding made by the Trial Court (Findings of Fact, Paragraphs 7 to 9, R. 153, 154); and the decision of the Wisconsin Supreme Court is based solely on those findings and the statute (R. 166).

That the Wisconsin law is so general and automatic in its application is illustrated by the decision of the Wisconsin Supreme Court in the case of **Wisconsin Telephone Co. v. Wisconsin Employment Relations Board**, 253 Wis. 584, 34 N. W. 2d 844, in which the court sustained an ex parte determination by the Wisconsin Employment Relations Board that the law was applicable to a threatened strike of some 570 non-supervisory employees of the accounting department of the Wisconsin Telephone Co. In assuming jurisdiction under the law, the State Board stated that while there was no assurance that a strike of the clerical employees would or would not result in the interruption of telephone service anywhere in the State of Wisconsin; and although, with the plant and operating departments both working, telephone service would undoubtedly continue for some period of time; nevertheless, because a prolonged strike carries with it the threat of disorder and because picket lines are sometimes infiltrated by "Communists and others of their ilk bent upon stirring up trouble"; therefore, "there is likely to be a stoppage of telephone service and thus an interruption of an essential service."

That type of situation is to be contrasted to the situation in the **O'Brien** case, supra, where Michigan was not permitted to condition the calling of a strike on a majority vote, although the strike would involve not only the major

industry of the City of Detroit but one of the key industries in the United States. Yet, Wisconsin here prohibits strikes in a local transit industry; and has applied its law in other cases to 350 clerical employees of a gas utility **(In re: Milwaukee Gas Light Co. and United Association of Office, Sales and Technical Employees**, Case No. 1767, PU-2, November 7, 1947); and 14 employees of an electrical utility **(In re: Eau Claire Electric Cooperative and International Brotherhood of Electrical Workers, Local No. 953**, A. F. of L., Case No. 2894, PU-22, August 22, 1949).[13]

It is apparent that what Wisconsin has done has been to predetermine by statute that any "interruption", no matter how slight or incomplete, of any broadly defined "essential service", creates an emergency situation sufficient to invoke the drastic provisions of the Wisconsin Act, without any necessity of an investigation or finding by either the executive, legislative or administrative branch with respect to the effect on the public of the particular dispute. A conclusive presumption of "disaster" thus becomes the basis for denial of rights under the Fourteenth Amendment. Such conclusive presumption was applied here to a threatened strike in a local transit system without any evidence of how complete the interruption of the service might be and without any consideration of the possible effects that such strike might have upon the public health and safety.

Section 111.62 of the Wisconsin Statutes further violates the due process clause of the Fourteenth Amendment, because it is so indefinite and vague that it requires working men to speculate at their peril on what acts will result in

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13 More recently the law was invoked and applied to the picketing of the Wisconsin Telephone Co., a local telephone utility, by employees of a non-public utility employer, engaged in a national strike, because of the refusal of some telephone operators to report to work while picketing was in progress. An injunction restraining such picketing was issued by the Circuit Court for Milwaukee County, based upon Section 111.62. Milwaukee Journal, November 16, 1950.

penal sanction. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. **United States v. Brewer,** 139 U. S. 278, 288; **Weeds v. United States,** 255 U. S. 109; **United States v. L. Cohen Grocery Co.,** 255 U. S. 81; **Connally v. General Construction Company,** 269 U. S. 385.

The Wisconsin law fails to meet this test principally because whether or not the contemplated action of the employees will cause an "interruption" within the meaning of the Act is not always ascertainable. Whether a particular strike may cause such interruption will be dependent upon the ease of replacement of striking employees, the nature of the work performed by such employees, and the number of employees who might respond to the strike call.

The Wisconsin law, in Section 111.54, imposes the duty upon the Wisconsin Employment Relations Board to determine in the first instance whether or not a failure to settle the dispute will cause or is likely to cause the interruption of essential service. **Wisconsin Telephone Co. v. Wisconsin Employment Relations Board,** supra.

We thus have the peculiar situation that working men are required, before they engage in any concerted activities by way of strike, work stoppage or slowdown, to determine whether or not such activities would cause an "interruption" of an essential service; while, at the same time, the Legislature has recognized that not all of such activities would cause an interruption, and so has placed within the jurisdiction of an administrative agency the power, as well as the duty, to determine whether, in a particular case or under particular circumstances, the interruption would occur.

III

THE WISCONSIN LAW IS IN VIOLATION OF THE THIRTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The full and absolute scope of the restraint on concerted leaving of employment under the statute and injunction is apparent on their face (Section 111.62; R. 155). While such injunction continues in force, the employees of the utility, for all practical purposes, cannot enjoy the freedom of labor which the Thirteenth, no less than the Fourteenth, Amendment was intended to assure. For the Thirteenth Amendment is not limited in its application to "African slavery" but "was a charter of universal civil freedom for all persons, of whatever race, color, or estate under the flag. * * * The plain intention was to abolish slavery of whatever name and form and all its badges and incidents." **Bailey v. Alabama**, 219 U. S. 219, 241.

"Slavery" is a harsh word, as is the term "involuntary servitude"; but calling the condition only a restraint on "concert" or "conspiracy" does not make it any more acceptable. Consider the situation of the utility employee: his employer enjoys a monopoly in a particular geographic area. In the course of his employment he has acquired special skills and abilities peculiarly useful to his employer in the narrow field—skills and abilities which have the same or greater value only to another employer in the same field. His individual right to quit means, then, that he must abandon the special skills developed over many years of service and develop new ones if he wants to retain his roots in the community; or he must uproot himself and his family and move to whatever area in which a job may be open with a similar utility monopoly. If the pressure to quit, because of the frustrations of the law, induces many others to do likewise (all being careful not

to discuss their desire or plans with their co-employees lest they commit the crime of instigating, inducing, conspiring, or encouraging) then the limited opportunity to find employment at home or miles away must be divided among all such others and thus further reduced.

Such situation has all of the "badges and incidents" of slavery. **Bailey v. Alabama,** supra. It does not permit the maintenance "of a system of completely free and voluntary labor throughout the United States" and it is one in which "* * * there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition." **Pollock v. Williams,** 322 U. S. 4, 17-18.

Recently, in refusing to hold an injunction in a labor case as contrary to the 13th Amendment this court stated: "However, nothing in the statute or the order make it a crime to abandon work individually (compare **Pollock v. Williams,** 322 U. S. 4) or **collectively." International Union, United Automobile Workers, A. F. of L., v. Wisconsin Employment Relations Board,** 336 U. S. 245, 251. (Emphasis ours.) The provision of the Wisconsin Statutes and injunction now before the Court does just that. It does make it a crime to abandon work collectively and, for all practical purposes, individually.

While the above quoted expression of the court appears to be the closest it has come to recognizing that restraint on, or criminal punishment of, collective refusals to work fall within the ban of the Thirteenth Amendment, individual members of the Court have made the same suggestion. See Brandeis, J., dissenting, in **Bedford Cut Stone Company v. Journeymen Stone Cutters Association,** 274

U. S. 37.65; Rutledge, J., concurring, in **American Federation of Labor v. American Sash & Door Co.**, 335 U. S. 538, 559.

A number of lower courts have held that such restraint imposes involuntary servitude. **Arthur v. Oakes**, 63 Fed. 310 (C. A. 7, 1894); **Kemp v. Division 241**, 99 N. E. 389 (Ill. 1912); **United States v. Petrillo**, 68 F. Supp. 845, 849 (N. D. Ill. 1946), **reversed on other grounds**, 332 U. S. 1 (1947).

And this Court has had no hesitancy in recognizing such concerted refusals as the exercise of basic rights, without, however, assigning to either the Thirteenth or the Fourteenth Amendment the role of guardian. **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, 209; **National Labor Relations Board v. Jones & Laughlin Steel Corp.**, 301 U. S. 1, 33; **National Labor Relations Board v. Fansteel Metallurgical Corp.**, 306 U. S. 240, 256.

It is submitted that to say that one person may protest the conditions under which he works by withholding his services, but that he may not, through his labor organization or otherwise, agree with others to exercise that right in concert would make a sham of the protection afforded by the Thirteenth Amendment.

CONCLUSION

It is respectfully submitted that the Wisconsin statute and the judgment based on such statute are in violation of Article I, Section 8, and Article VI of the federal Constitution because they intrude upon or are in conflict with congressional action in the same field; and are in violation of the Thirteenth and Fourteenth Amendments to the federal Constitution because they impose involuntary servitude and deprive of liberty and property without due

process of law. For these reasons the judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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